Supreme Court, U. S.
FILED
JUL 25 1979
MICHAEL RODAK, JR., CLERK

No. 79-121

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

BILLY GALE HENRY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

SARA SUN BEALE
Assistant to the Solicitor General

DAVID B. SMITH
Attorney
Department of Justice
Washington, D.C. 20530

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statement	2
Reasons for granting the petition	9
Conclusion	14

CITATIONS

Cases:

Brewer v. *Williams*, 430 U.S. 387 .....8, 10, 11
Massiah v. *United States*, 377 U.S. 201....6, 9, 10
United States v. *Luciow*, 518 F.2d 298.... 13
Wilson v. *Henderson*, 584 F.2d 1185 rehearing denied, 590 F.2d 408, cert. denied, No. 78-6610 (June 18, 1979).....9, 11, 12

Constitution, statutes and rule:

United States Constitution, Sixth Amendment 9
18 U.S.C. 2113(a) 3
18 U.S.C. 2113(b) 3
28 U.S.C. 2255 5
Fed. R. Crim. P.:
Rule 12 10
Rule 12(b) 10
Rule 12(c) 10

In the Supreme Court of the United States

OCTOBER TERM, 1978

No.

UNITED STATES OF AMERICA, PETITIONER

v.

BILLY GALE HENRY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, la-24a) is reported at 590 F.2d 544. The memorandum order of the district court (App. D, *infra*, 27a-51a) is not reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 25a) was entered on December 26, 1978. The gov-

ernment's petition for rehearing was denied on March 30, 1979 (App. C, *infra*, 26a). On June 14, 1979, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including July 28, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether respondent's right to counsel was violated by the admission of statements he made in the course of general conversation with a cellmate who had agreed to act as a government informant and had been instructed not to question respondent.

STATEMENT

1. On August 28, 1972, the Janaf Branch of the United Virginia Bank/Seaboard National was robbed at gunpoint by two masked men who entered shortly after opening, as the bank's employees were processing the night deposits (Tr. 8-10, 35-36).[1] A bank employee observed the two men drive away in a tan Ford automobile with Virginia license BBL-373 (Tr. 38-39). The witness also observed a third man who had been waiting in the automobile (Tr. 40).

About an hour later, agents searching the area near the bank discovered the getaway car, which had been left illegally parked, with the doors ajar and the keys in the ignition (Tr. 72-74). When the agents searched the car, they discovered a rent receipt and a lease for a house on Wailes Avenue in Norfolk (Tr. 74-76). Shortly thereafter, two men subsequently

[1] "Tr." refers to the transcript of respondent's trial.

convicted of participating in the robbery were arrested at the rented house, where agents also discovered the proceeds of the robbery, as well as the guns and masks the robbers had employed (Tr. 78-82). Further investigation disclosed that respondent had rented the house on Wailes Avenue under an assumed name, and his palm print was identified on the copy of the lease found in the getaway car (Tr. 169-170, 182-185).

Respondent was indicted on charges of armed bank robbery, 18 U.S.C. 2113(a) and (d), and incarcerated prior to trial in the Norfolk City Jail (App. A, *infra*, 3a). Shortly thereafter Gerald Coughlin, an FBI agent who participated in the investigation of the Janaf bank robbery, contacted Edward Nichols. At that time, Nichols, who had previously acted as a paid FBI informant, was incarcerated in the Norfolk City Jail on local forgery charges (App. G, *infra*, 57a-58a). Nichols informed Coughlin that he was being held in the same cell block as various federal prisoners who were awaiting trial, including respondent (App. A, *infra*, 3a).[2] Agent Coughlin asked Nichols to be alert to any statements made by these individuals about the charges against them, but he specifically warned Nichols not to initiate conversation with or question respondent regarding the bank robbery (App. A, *infra*, 3a; App. G, *infra*, 58a, 60a). Nichols later in-

[2] Nothing in the record indicates that Coughlin contacted Nichols in order to gain evidence about petitioner's involvement in the Janaf bank robbery. To the contrary, Coughlin's statement suggests that he was not aware that respondent and Nichols were in the same cellblock until Nichols informed him of this fact (see App. G, *infra*, 58a-59a).

formed Agent Coughlin that respondent had engaged him in conversation, during the course of which respondent had described how the bank robbery had occurred (App. A, *infra*, 3a). The FBI paid Nichols for furnishing this information (*ibid.*).

2. Respondent was tried before a jury in the Norfolk Division of the United States District Court for the Eastern District of Virginia. Nichols testified, without objection, that respondent had admitted going to the Janaf bank prior to the robbery to see who opened the vault, that respondent had described the robbery to him, and that he had stated that the only thing the prosecution had connecting him to it was the rent receipt (Tr. 136, 138). Nichols also stated that federal agents had not requested him to ask respondent any particular questions (Tr. 135).

Joseph Sadler, who had also been respondent's cellmate, testified that respondent admitted to him that he had robbed a bank and hit one of the bank employees with a gun (Tr. 142). Sadler stated that he had informed the FBI of respondent's statements on the advice of his attorney (Tr. 143-144). The remainder of the government's evidence consisted of testimony identifying respondent as the person who had rented the house on Wailes Avenue under an assumed name (Tr. 182-185); the masks, guns, and money found in the rented house (Tr. 82-83); and evidence that respondent, again under an assumed name, had ordered parts for a police radio scanner found at the rented house (Tr. 154-159, 177-181).

Respondent was convicted and sentenced to imprisonment for a term of 25 years (Tr. 249). His conviction was affirmed by the court of appeals in a per curiam order, 483 F.2d 1401 (1973), and certiorari was denied, 421 U.S. 915 (1975).

3. On August 28, 1975, respondent moved to vacate his sentence pursuant to 28 U.S.C. 2255. Among other grounds for relief, respondent alleged for the first time that the introduction of Nichols' testimony violated his right to counsel.[3] The district court denied the motion without a hearing, and the court of appeals, in an unpublished order (App. F, *infra*, 54a-55a), remanded the case for an evidentiary inquiry to determine, *inter alia*, whether Nichols was acting as a government agent during his jail cell conversations with respondent.

On remand, Agent Coughlin submitted an affidavit (App. G, *infra*, 57a-60a) stating that Nichols had agreed to act as a government informant prior to his conversations with respondent and that Coughlin had instructed Nichols "not to initiate any conversations" with respondent regarding the charges against him, but "to pay attention" if respondent initiated any conversations with him. Coughlin stated (*id.* at 59a) that the FBI had paid Nichols for the information he furnished. Finally, Coughlin averred (*id.* at 59a-60a) that he had not requested that Nichols be placed in

[3] Respondent's pro se petition also alleged that the government had knowingly permitted the introduction of perjured testimony by Joseph Sadler, violated the court's pretrial discovery order, and failed to disclose exculpatory material, and that respondent's counsel had not rendered effective assistance.

respondent's cell, nor had he interceded with jail officials on Nichols' behalf.

After receiving Coughlin's affidavit and that of the other agent in charge of the Janaf bank investigation, the district court, without conducting any further evidentiary proceedings, again denied respondent's motion to vacate his sentence (App. D, *infra*, 27a-51a). The court concluded (App. D, *infra*, 39a) that this case was distinguishable from *Massiah* v. *United States*, 377 U.S. 201 (1964), because Nichols was not requested to question respondent or seek information from him, but only to report anything incriminating that he heard. The district court also noted that it credited the agents' statements that they had not intentionally placed Nichols in respondent's cell (App. D, *infra*, 39a). Alternatively, the district court held (App. D, *infra*, 39a-40a) that respondent had waived any objection he might have had to the admission of Nichols' testimony by his failure to object at trial. Finally, the court concluded that any error had been harmless (App. D, *infra*, 40a).

4. A divided panel of the court of appeals reversed and remanded with instructions that respondent be released from custody unless the government elected to retry him (App. A, *infra*, 1a-24a). The majority concluded (App. A, *infra*, 7a):

> If, by association, by general conversation, or both, [respondent] developed sufficient confidence in Nichols that [respondent] bared his incriminating secrets to an undisclosed paid informer, we think that there was interrogation within the meaning of *Brewer* [v. *Williams*, 430 U.S. 387 (1977)]. We hold therefore that [respondent's] right to counsel was violated when the government proved incriminating statements made to his cellmate after his indictment and in the absence of counsel.

Finding that the admission of Nichols' testimony could not be deemed harmless beyond a reasonable doubt, the majority reversed the judgment of the district court (App. A, *infra*, 7a-8a).[4]

Judge Butzner, who joined the majority opinion, also filed a concurring opinion stressing (App. A, *infra*, 9a) that "the informant's conclusory statement that he did not question the defendant is not determinative," because "[t]he critical issue is whether, after judicial proceedings had been initiated against the defendant, an informant—acting as an agent of the government—elicited information from him in the absence of defense counsel." Judge Butzner concluded (*ibid.*) that "absent testimony by the informant about what he said to [respondent], the judgment must be reversed because of the informant's admission that he had conversed with [respondent] and because of [re-

---

[4] Neither the panel's opinion nor the concurring and dissenting opinions addressed the district court's ruling that respondent had waived this claim by his failure to object to Nichols' testimony at trial. On appeal, respondent contended (Reply Br. at 4 & n.5) that no waiver of this objection occurred at trial because respondent was unaware of the critical fact that Nichols was a paid government informant, and thus lacked the information necessary to assert his *Massiah* claim.

spondent's] assertion that the conversation was a form of questioning." [5]

Judge Russell dissented (App. A, *infra*, 10a-24a). He argued (*id.* at 10a) that *Massiah* and *Brewer* v. *Williams*, 430 U.S. 387 (1977), require "exclusion only when the challenged testimony is the result of 'interrogation.'" Quoting Justice Blackmun's dissenting opinion in *Brewer*, *supra*, 430 U.S. at 440, Judge Russell urged (App. A, *infra*, 12a; emphasis in original) that neither an informant's presence alone nor his listening constitutes interrogation: "The mere 'subjective desire to obtain information from a suspect after arraignment,' if unaccompanied by some affirmative action, either direct or subtle, reasonably *calculated to induce conversation relative to the crime*, will not satisfy the requisite of interrogation." Since "[t]he record indicates that [respondent's] incriminating statements were voluntarily and spontaneously given without any encouragement from Nichols," Judge Russell found (App. A, *infra*, 14a) that "there was no 'interrogation' of [respondent] by Nichols, however broadly that term may be defined." Moreover, *Brewer* established, in his view, that "whether the confession or damaging admission had been 'elicited surreptitiously' was 'constitutionally irrelevant'" (App. A, *infra*, 15a, quoting 430 U.S. at 400). Judge Russell also pointed out (App. A, *infra*, 21-24a) that on nearly identical facts

[5] Judge Butzner noted (App. A, *infra*, 9a) that the district judge's harmless error ruling was founded on the mistaken belief that there had been an eyewitness identification of respondent as one of the bank robbers.

the Second Circuit in *Wilson* v. *Henderson*, 584 F.2d 1185 (2d Cir. 1978), rehearing denied, 590 F.2d 408 (1979), cert. denied, No. 78-6610 (June 18, 1979), recently found that there had been no infringement of the Sixth Amendment right to counsel.

The government's petition for rehearing with suggestion of rehearing en banc was denied, with three judges dissenting (App. C, *infra*, 26a).

REASONS FOR GRANTING THE PETITION

In *Massiah* v. *United States*, 377 U.S. 201 (1964), this Court concluded that statements obtained through interrogation, in the absence of counsel, of a defendant facing criminal charges could not be admitted at his trial without violation of the Sixth Amendment right to counsel. The proper application of the *Massiah* rule is of substantial importance in the context of inculpatory statements made by defendants while in jail awaiting trial. It is not uncommon for jail inmates—motivated by a desire for lenient treatment in their own cases, or by a prospect of monetary payments for information—to offer to report to authorities statements made by fellow inmates. It is imperative that police and prosecutors know the rules that govern the proper conduct of informants in such circumstances, and that courts understand the criteria governing the admissibility of informant testimony regarding such statements. As a result of the decision of the court of appeals in the present case, which conflicts with a recent decision of another court of appeals, the matter has been

thrown into considerable doubt. This case affords the Court an excellent opportunity to clarify this important area of constitutional law.[6]

1. Under the decision of the court of appeals, mere "association" or "general conversation" between cellmates apparently suffices to convert their exchange into "interrogation" within the *Massiah* proscription. This unprecedented conclusion is tantamount to a per se rule barring the admission of all statements made by a defendant to any fellow inmate who has agreed to act as an informant, even where the government has instructed the informant not to question the defendant.

The holding of the court of appeals is not supported by this Court's opinion in *Brewer* v. *Williams*, 430 U.S. 387 (1977), which succinctly summarized the holding in *Massiah*: "[T]he clear rule of *Massiah* is that once adversary proceedings have commenced

[6] As noted in the Statement, the district court based its denial of relief in part on the ground that respondent had waived his *Massiah* claim by his failure to object to the informant's testimony at trial. Respondent contended that he was unaware of the facts necessary to raise this claim until after trial. See note 5, *supra*. The court of appeals made no finding on the question whether Nichols' trial testimony was sufficient to alert respondent to the possible existence of this claim; indeed, its opinion does not discuss this issue at all. While we believe that respondent did waive his claim both by failing to object at trial and by failing to raise the issue on appeal, we do not present the issue for decision by this Court. The question is not of continuing importance in view of the amendments to Fed. R. Crim. P. 12, which took effect after respondent's trial and clarified the applicable standards for waiver (see Rules 12(b) and (f)).

against an individual, he has a right to legal representation when the government interrogates him" (*id.* at 401; footnote omitted). But "no such constitutional protection would have come into play if there had been no interrogation" (*id.* at 400). As the Court noted (*id.* at 399-400 n.6), the State had conceded that the "Christian burial speech," given to a deeply religious former mental patient over the course of several hours on Christmas Eve, constituted interrogation. And in his concurring opinion Justice Powell described the speech as "a skillful and effective form of interrogation" in a situation where "the entire setting was conducive to the psychological coercion that was successfully exploited" (*id.* at 412). Nothing in the Court's opinion suggests that mere "association" or "general conversation" constitutes interrogation.

2. Accordingly, on facts virtually identical to those in the present case, the Second Circuit recently held, in *Wilson* v. *Henderson*, 584 F.2d 1185, 1190-1191 (1978), that statements made by a defendant to a cellmate turned informant were not the product of an interrogation.[7] The court noted that Wilson's cellmate—like Nichols in this case—"had been specifically directed to refrain from questioning Wilson." 584 F.2d at 1190. The court contrasted the deliberate

[7] The petition for certiorari in *Wilson* v. *Henderson*, No. 78-6610, alleged that the Second Circuit's decision conflicts with the Fourth Circuit's decision in this case (Pet. 7, 9-10). However, the *Wilson* petition was jurisdictionally out of time (see Pet. 2); it was denied on June 18, 1979.

efforts in *Brewer* to elicit statements from the defendant by appealing to his religious convictions with the cellmate's function, which had been simply to listen to any statements Wilson might make (*id.* at 1191). The *Wilson* court found that, given the informant's instructions, there was no violation of *Massiah* (*ibid.*):

> The instructions to [the informant] suggest a conscious effort on [the investigating officer's] part to guard Wilson's constitutional rights while pursuing a crucial homicide investigation. His directions "Don't ask questions; just keep your ears open," suggest familiarity and attempted compliance with, not circumvention of, the principle of *Massiah*.

As the *Wilson* court correctly concluded, the behavior of the investigating agents in that case was wholly proper. That conclusion is equally applicable here. In both cases the agents instructed the cellmate who offered to act as an informant not to question the defendant about the offense or to initiate conversation on the subject, but to report any statements the defendant might volunteer. No "interrogation" resulted in either case.

The majority's conclusion that "association" or "general conversation" between cellmates constitutes interrogation is apparently founded on the court's concern about "the restrictive nature of the jailhouse setting" (App. A, *infra*, 5a). The court's underlying assumption—that a prisoner who has offered to act as an informant should avoid all association or general conversation with other prisoners—is unrealistic. A prisoner who has simply offered to relate incriminating statements he overhears should not be required to remove himself from all day-to-day association with his fellow prisoners, nor is it likely that he could do so without arousing their suspicion and perhaps even endangering himself. There is simply no legal basis for transforming mere day-to-day association or casual conversation about general topics into interrogation.

3. Although the agents have filed affidavits, no hearing was held on respondent's allegation that Nichols interrogated him. But as Judge Russell pointed out (App. A, *infra*, 13a-14a), the record developed to date "indicates that [respondent's] statements were voluntarily and spontaneously given without any encouragement from Nichols," and "[t]here is no evidence that Nichols in any way violated the instructions given him by the agent." In our view, even if Nichols had violated his instructions, it would not be correct to treat his actions as *government* interrogation. The situation would be essentially the same as if a fellow prisoner had asked these questions on his own motion, and only later agreed to act as a government informer. In neither case would the government have authorized the informant to question respondent, and neither case should be treated as government interrogation. Cf. *United States* v. *Luciow*, 518 F.2d 298, 300 (8th Cir. 1975).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

SARA SUN BEALE
Assistant to the Solicitor General

DAVID B. SMITH
Attorney

JULY 1979

APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-2338

BILLY GALE HENRY, APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Richard B. Kellam, Chief Judge.

Argued October 4, 1978 Decided December 26, 1978

Before Winter, Butzner and Russell, Circuit Judges.

Jim Moody, Third Year Law Student (Michael E. Geltner and Larry J. Ritchie, Professors, Georgetown

University Law Center, on brief) for Appellant; Roger T. Williams, Assistant United States Attorney (William B. Cummings, United States Attorney, on brief) for Appellee.

WINTER, Circuit Judge:

After an unsuccessful appeal of his conviction for armed bank robbery in violation of 18 U.S.C. §§ 2113 (a) and (d), United States v. Henry, No. 73-1413 (4 Cir., Sept. 14, 1973) (unpublished), Billy Gale Henry moved to vacate his twenty-five year sentence pursuant to 28 U.S.C. § 2255. Among other grounds for relief, he claimed that, during his confinement after indictment and in the absence of counsel, incriminating statements were obtained from him by a cellmate acting as a government agent.[1] The district court denied the motion, and on appeal the case was remanded for an evidentiary inquiry. Henry v. United States, No. 75-2142 (4 Cir., Mar. 29, 1977) (unpublished). Affidavits submitted by the FBI agents in charge of the robbery investigation verified that one of Henry's cellmates was employed by the government to monitor Henry's statements. The district judge, nevertheless, again denied the motion to vacate. Because we conclude that Henry was denied

[1] The record is not clear as to whether, at the time the statements were obtained, counsel had been retained or appointed or whether the mere right to counsel had attached. The factual uncertainty is unimportant because the government does not dispute that Henry had *not* waived his right to counsel at the time of his conversations with his cellmate.

his right to counsel, we reverse and direct that the motion to vacate be granted and Henry released from custody on the charge unless the government elects to try him anew.

I.

Following his indictment on a charge of armed bank robbery, Henry was incarcerated in the Norfolk City Jail. Shortly thereafter, an FBI agent contacted Edward Nichols who was also an inmate at the Norfolk City Jail and who had been a paid informant of the FBI for over a year. Nichols advised the agent that Nichols was in the same cell block as Henry, as well as other federal prisoners awaiting trial. The agent then told Nichols to be alert to any statements made by these individuals about the charges against them. Nichols was specifically warned not to initiate conversation with or question Henry regarding the bank robbery.

When the agent contacted Nichols again a few weeks later, Nichols reported that Henry had engaged him in conversation, that Henry had talked about the bank robbery charges, and that he had described how the bank robbery had occurred. Nichols was paid by the FBI for furnishing this information.

At Henry's trial, Nichols testified that Henry had admitted going to the bank prior to the robbery to see who opened the vault and he further admitted renting the house indicated on the rental receipt found in the getaway car. According to Nichols, Henry had also described the actual robbery to him. Aside from Nichols' testimony, the case against Henry consisted

of: the testimony of another cellmate, Joseph Sadler, as to conversations in which Henry admitted robbing the bank; evidence that Henry, under an assumed name, rented the house where two of the three robbers, the money stolen, and the masks and clothes used in the robbery were found shortly after the crime; and evidence that Henry, again under an assumed name, ordered a crystal of the same frequency as one used in the police radio scanner found in the house where the two robbers were apprehended.

II.

The sole issue presented in this case is whether the undisclosed government monitoring of Henry's conversations after his indictment, while he was in custody and had not waived his right to counsel, violated Henry's right to counsel under the sixth amendment. The resolution of this issue depends on the application of the rule established in Massiah v. United States, 377 U.S. 201 (1964).

In *Massiah*, a conversation between Massiah, who had been released on bail, and his co-defendant was recorded by government agents with the co-defendant's consent. During the conversation Massiah made incriminating statements which were later introduced at his trial. The Supreme Court reversed his conviction, holding that Massiah was denied the right to counsel when evidence was admitted "which federal agents had deliberately elicited from him after he had been indicted and in the absence of counsel." 377 U.S. at 206. The Court thought it inconsequential that Massiah was not confined at the time, for " 'if such a rule is to have any efficacy it must apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse.' " *Id.*, *quoting* United States v. Massiah, 307 F.2d 62, 72 (2 Cir. 1962) (Hays, J., dissenting). There was no finding that any of the co-defendant's actions, aside from his mere presence, had induced the damaging remarks.[2]

Subsequently, several courts held that Massiah did not apply to all incriminating statements obtained by government agents after indictment and in the absence of counsel, but only to those statements *induced* by such agents. This refinement was summarily rejected by the Supreme Court in two per curiam opinions, McLeod v. Ohio, 381 U.S. 356 (1965), and Beatty v. United States, 389 U.S. 45 (1967). *McLeod* reversed a state court holding that *Massiah* was not applicable absent questioning or deception. Similarly, *Beatty* overturned the Fifth Circuit's determination that information volunteered to an unknown government informer was admissible despite *Massiah*. The facts of this case would be identical to those in *Beatty* except that Beatty was not in jail at the time of the interception. Because of the restrictive nature of the jailhouse setting, the instant case presents a far more compelling situation for the application of the *Massiah* rule.

---

[2] The opinion of the Court of Appeals, however, indicated that the co-defendant had solicited information about the pending case. United States v. Massiah, 307 F.2d 62, 66 (2 Cir. 1962).

The government asserts that Brewer v. Williams, 430 U.S. 387 (1977), limited *Massiah* and its progeny to cases involving "interrogation." In *Brewer*, a police detective enticed the defendant, a former mental patient and deeply religious person, to reveal the location of his victims body by suggesting to the defendant that a predicted snowfall would preclude the Christian burial of the victim. Equating the "Christian burial speech" with "interrogation," the Supreme Court declared that "the clear rule of *Massiah* is that once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him." 430 U.S. at 401. The Court noted, moreover, that there is no constitutional protection where no "interrogation" takes place. *Id.* at 400.

Notwithstanding the several references to "interrogation" in the *Brewer* opinion, we do not think that *Brewer* limits *Massiah* to cases in which the government has directly questioned the accused about his participation in crime. In the first place, the Supreme Court cited *McLeod, supra*, with approval, 430 U.S. at 400, in which *Massiah* was applied even though McLeod was not interrogated by the officers and he knew that they were officers. Secondly, "interrogation" is a relative term, and we agree with the Fifth Circuit in United States v. Anderson, 523 F.2d 1192, 1196 (1975), that it is not restricted to formalized oral interrogation. An undisclosed government agent may effectively "interrogate" a defendant by simply engaging the defendant in a general conversation

and if the response is a confession of guilt, the agent need not make any further more pointed inquiries. Miller v. California, 392 U.S. 616 (1968) (dissent from dismissal of certiorari).

In the instant case, even if we assume that Nichols obeyed his instructions not to interrogate Henry about the bank robbery, Nichols did testify that he engaged in conversation with his cellmate Henry. If, by association, by general conversation, or both, Henry developed sufficient confidence in Nichols that Henry bared his incriminating secrets to an undisclosed paid informer, we think that there was interrogation within the meaning of *Brewer*. We hold therefore that Henry's right to counsel was violated when the government proved incriminating statements made to his cellmate after his indictment and in the absence of counsel.[3]

III.

The district court found that, even if Henry's right to counsel was violated, admission of the incriminating statements was harmless error. While other evidence was introduced linking Henry to the robbery, we cannot say beyond a reasonable doubt that Nichols' testimony did not influence the jury's verdict. *See* Chapman v. California, 386 U.S. 18, 24 (1967).

---

[3] We express no opinion about the interception of prisoners' conversations with non-government agents through electronic listening devices. *See* United States v. Hearst, 563 F.2d 1331 (9th Cir. 1977), cert. denied, —— U.S. —— (1978), in which the Ninth Circuit held that such interception did not violate the sixth amendment under *Massiah*.

For these reasons, the judgment denying the motion under § 2255 is reversed, and the case is remanded with instructions that the motion be granted and Henry released from the charge against him unless the government elects to try him anew.

REVERSED AND REMANDED.

BUTZNER, Circuit Judge, concurring:

I concur in Judge Winter's opinion. I write briefly, however, to amplify my reasons for concluding that the judgment of the district court must be reversed.

In its opinion, the district court acknowledged the defendant's claim that the government's informant had questioned him in jail about the bank robbery. Nevertheless, the court denied an evidentiary hearing on this issue. Instead, it wrote:

> Here, the Court accepts the statements of the FBI agents that they did not request Nichols [the informant] to question Henry [the defendant] or engage him in conversation, but only to listen to any statement Henry might make within their [sic] hearing and report it to them. Nichols confirms this.

The informant denied questioning the defendant. He did not, however, fully comply with the instructions that he was not to "engage him in conversation, but only to listen." He admitted that he had "some conversations" with the defendant, but he did not divulge what he said to the defendant.

As Brewer v. Williams, 430 U.S. 387 (1977), demonstrates, the informant's conclusory statement that he did not question the defendant is not determinative. The critical issue is whether, after judicial proceedings had been initiated against the defendant, an informant—acting as an agent of the government—elicited information from him in the absence of defense counsel. Proof of formal interrogation is unnecessary to invoke the protection of the sixth amendment. A conversation that is tantamount to interrogation is sufficient. 430 U.S. at 397-401.

It would have been prudent for the district court to have conducted an evidentiary hearing to dispel the ambiguity of the documentary evidence, especially since the government did not reveal the substance of its paid informant's conversation. Nevertheless, absent testimony by the informant about what he said to the defendant, the judgment must be reversed because of the informant's admission that he had conversed with the defendant and because of the defendants' assertion that the conversation was a form of questioning. *See* Massiah v. United States, 377 U.S. 201 (1964); Brewer v. Williams, 430 U.S. 387 (1977).

The district court ruled alternatively that the admission of the informant's testimony was harmless error because the defendant "was clearly identified by eyewitnesses as one of the bank robbers." On this score, the district judge's recollection of the evidence was inaccurate. The defendant was not identified by any witness to the robbery. Indeed, the government's brief acknowledges that its case against

the defendant was founded solely on statements of informants and circumstantial evidence. I therefore join in Judge Winter's conclusion that the error was not harmless.

RUSSELL, Circuit Judge, dissenting:

I respectfully dissent.

The issue in this case is whether the testimony of Nichols, recounting the incriminating information given him by the defendant while the two were prison cellmates, should have been excluded as violative of the defendant's right to counsel under the Sixth Amendment. The majority, relying on *Massiah*[1] for authority, would hold that it should be excluded. I disagree.

As I read *Massiah*, it commands exclusion only when the challenged testimony is the result of "interrogation." And this is indisputably the way the Supreme Court in the recent case of *Brewer* v. *Williams*[2] read *Massiah*. The prevailing opinion of Justice Stewart in *Brewer* declared "that once adversary proceedings have commenced against an individual, he has a right to legal representation *when the government interrogates him*" but, applying the rule to the facts in *Brewer*, it added that "no such constitutional protection [of the right to counsel] would have come into play if there had been no interrogation." (Italics added)[3] Justice Powell in

[1] 377 U.S. 201 (1964).

[2] 430 U.S. 387 (1977).

[3] 430 U.S. at 400-401.

his concurring opinion (which was necessary to the decision of the Court) was even clearer. He saw the critical issue to be whether there had been interrogation in fact; if there were no interrogation, there would be no constitutional violation and no ground for exclusion.[4] The dissenting opinion agreed with the opinion of Justice Stewart that exclusion of the evidence turned on whether it was the result of "interrogation." Actually, the dispute in the various opinions in the case did not concern whether "interrogation" is a prerequisite for exclusion of incriminating statements by a defendant for a violation of the defendant's Sixth Amendment rights: the dispute centered on whether there had been "interrogation." "Interrogation" is thus established by *Brewer* as the key issue. To paraphrase again Justice Stewart's opinion in that case, "if there [has] been no interrogation," the constitutional right to counsel does "not come into play" or arise.

The majority opinion here appears to recognize that *Brewer* has now established beyond question that the issue in this case turns on whether the testimony in dispute was the result of "interrogation." It dismisses the issue, however, with the comment that " 'interrogation' is a relative term." If, by this, the majority means that "interrogation" is not limited to direct questioning, we would agree. In *Brewer*, the officer did not engage in direct questioning of the defendant. Knowing, however, that the defendant

[4] 430 U.S. at 410; Note, 38 *La. L. Rev.* 239, 244 (1977).

was of questionable mental capacity and of strong Christian faith, he made a very clever speech to the defendant about the shame of the small slain girl left out in the freezing cold without a decent "Christian burial" with the plain purpose of shaming him into revealing the whereabouts of the slain girl's body. That speech, the majority found, was "tantamount to interrogation" [5] or, as Justice Powell characterized it, was "a skillful and effective form of interrogation." [6] But presence, alone,[7] is not enough to constitute interrogation. Nor is listening interrogation. The mere "subjective desire to obtain information from a suspect after arraignment," if unaccompanied by some affirmative action, either direct or subtle, reasonably *calculated to induce conversation relative to the crime*, will not satisfy the requisite of "interrogation." [8] The officer or informer must stimulate, however, subtly, the incriminating conversation to satisfy the test of "interrogation."

---

[5] 430 U.S. at 400.

[6] 430 U.S. at 412.

[7] The suggestion that in *Massiah* the only action of the informer, inducing the confession by the defendant, was that he was simply present is rebutted by the citation in note 2 of the majority opinion, which quotes the language of the Court of Appeals in *Massiah* (307 F. 2d 62, 66 (2nd Cir. 1962)) indicating "that the co-defendant had solicited information about the pending case." Actually, the informer in *Massiah* deliberately engaged Massiah in conversation for the sole purpose of eliciting incriminating statements in order that the police might monitor them on a hidden radio. 377 U.S. at 202-203.

[8] 430 U.S. at 440 (Blackmun, J., dissenting).

The majority opinion makes little effort to qualify the action of the informer in this case as "interrogation" unless simply the "presence" of a paid informer is sufficient.[9] In any event, the conduct of the informer in this case would not so qualify. The informer Nichols was a state prisoner, serving a state sentence. He had formerly been a paid informer for the federal government but he had fallen afoul the state forgery laws and was at the time a state prisoner. In late November, 1972, an FBI agent visited Nichols at the jail where he was imprisoned. Nichols told the agent there were a number of federal prisoners, including the defendant, in his cell block in the jail. The agent did not know that the defendant and Nichols were cellmates and he had nothing to do either with Nichols being in the same jail with the defendant or with the two being made cellmates. The agent told Nichols to be alert to any statements by the federal prisoners. He expressly instructed Nichols not to initiate any conversation with the federal prisoners, but, if they talked, to pay close attention to what they said. Nichols was merely to listen. In particular, Nichols was directed "not to question [the defendant] in regard to the bank robbery."

Some weeks later, after Nichols had completed his state sentence and had been released, the agent saw Nichols, who told him of the incriminating statements he heard the defendant make. There is no evidence that Nichols had in any way violated the

---

[9] *See* note 7, *supra*.

instructions given him by the agent. The record indicates that the defendant's incriminating statements were voluntarily and spontaneously given without any encouragement from Nichols. And the District Judge so found. Under this finding, by which we are bound since it cannot be said to be clearly erroneous, there was no "interrogation" of the defendant by Nichols, however broadly that term may be defined.

The majority—I repeat—offers nothing to suggest that the statement of the defendant, testified to by Nichols, was secured as a result of "interrogation" beyond the ambiguous statement indicating that presence of an undisclosed informer-listener in the cell with the defendant satisfied "interrogation" under its definition of that term as merely "relative." This conclusion follows from the unique way in which the majority opinion proceeds to find "that there was interrogation within the meaning of *Brewer*." It predicated its crucial conclusion that there was interrogation by finding that "*by association, by general conversation*, or both, Henry developed *sufficient confidence in Nichols that Henry bared his incriminating secrets to an undisclosed paid informer*." (Italics added) In effect, what the majority is saying is that a defendant's voluntary incriminating admissions become the product of an interrogation, as that term is defined in *Brewer*, merely because the person who hears the voluntary admission is an "undisclosed paid informer" in whom the defendant "by association" has developed a "confidence" that the person will keep his secret.

The primary element of this definition of "interrogation" is apparently the "undisclosed" or "surreptitious" character of the government informer.[10] But *Brewer* made it quite plain that whether the confession or damaging admission had been "elicited surreptitiously" was "constitutionally irrelevant."[11] And this is the way *Brewer* has been interpreted by all the commentators.[12] Moreover, it was so applied in the recent case of *United States* v. *Hearst* (9th Cir. 1977) 563 F.2d 1331, 1348, *cert. denied* —— U.S. ——, 98 S. Ct. 1156. If, on the other hand, the

---

[10] This seems to follow from the earlier statement in the majority opinion, based on an opinion dissenting from denial of certiorari in *Miller* v. *California* (1968) 392 U.S. 616, that "[a]n *undisclosed* government agent may effectively 'interrogate' a defendant by simply engaging the defendant in a general conversation * * *." (Emphasis added)

[11] 430 U.S. at 400.

[12] *See*, Note, *The Right to Counsel: An Alternative to Miranda*, 38 *La. L. Rev.* 239, 244 (1977); Note, *The Right to Counsel and the Strict Waiver Standard*, 57 *Neb. L. Rev.* 543, 550 (1978).

The full quote in the *La. L. Rev.* is as follows:

> "While slight factual differences exist between the cases, [*Massiah* and *Brewer*] the majority resolved the difficulties by stating that whether incriminating disclosures made in the absence of counsel were elicited openly or surreptitiously is constitutionally irrelevant in determining whether the right to counsel had been abridged."

And it was in support of this point that the plurality opinion cited *McLeod* v. *Ohio* (381 U.S. 356) and only to this point. 430 U.S. at 400.

language of the majority opinion in its critical conclusion represents a general condemnation, on constitutional grounds, of the use of "undisclosed" undercover agents and informers, paid or unpaid, and the infiltration of such agents,—if their "*undisclosed*" character is the critical point in the majority opinion's holding of constitutional invalidity—it flies straight into the teeth of repeated decisions of the Supreme Court finding that the use of such undercover agents and informers presents no constitutional violation. The use of informers, whether voluntary or paid, has never been found to be reprehensible, or, to quote a leading case, "as a deprivation of due process of law based on the notion that such practice is 'unfair' or 'offend[s] those canons of decency and fairness which express [our] * * * notions of justice'." [13] Indeed, in a case last year which originated in this Circuit, the Court spoke approvingly of "the value it [undercover policework] often is to effective law enforcement." *Weatherford* v. *Bursey* (1977) 429 U.S. 545, 557. For other recent cases finding no constitutional taint attaching to undercover activities by the police, *see United States* v. *Russell* (1973) 411 U.S. 423, 432 and *United States* v. *White* (1971) 401 U.S. 745, 752. These authorities simply confirm the conclusion that the use of undercover agents, or "secret informers," does "not violate [the defendant's] Fourth, Fifth or Sixth Amendments rights." [14]

[13] *United States* v. *Fioravanti* (3d Cir. 1969) 412 F. 2d 407, 414, n. 15, *cert. denied sub nom Panaccione* v. *United States*, 396 U.S. 837, relying on *Hoffa* v. *United States*, 385 U.S. at 310-311.

If the heart of the crucial rule promulgated by the majority, however, is that the association as a cellmate creates such a feeling of "confidence [in a defendant]" as to induce him to "bare his incriminating secrets" to the undisclosed paid informer-cellmate as to make it a constitutional violation to admit into evidence other "incriminating secrets," it is effectively refuted by the ruling of the court in *Hoffa* v. *United States* (1966) 385 U.S. 293, 302, that the Constitution affords no protection to "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it," even when that person is an "undisclosed informer." In that case, the informer had insinuated himself into the defendant's confidence by representing himself as a long-time friend and associate anxious to aid in the defendant's defense. This principle in *Hoffa* was followed in *Fioravanti*, in which an undercover agent infiltrated the criminal group, was arrested with the group, and while both the defendant and the undercover agent were "confined [together] in the bull pen," the defendant, who "thought that he was conversing with a fellow partner in crime, not a policeman," made incriminating statements.[15] The court had no hesitancy in finding the testimony of the undercover agent about the in-

[14] *United States* v. *Fioravanti, supra,* at 413, n. 15, 412 F. 2d.

[15] 412 F. 2d at pp. 409 and 413.

criminating statements admissible in that case. And the ruling in that case is similar in many respects to our own case of *United States* v. *Dowdy* (4th Cir. 1973) 479 F. 2d 213, 229-230, *cert. denied* 414 U.S. 823, 866, *reh. denied* 414 U.S. 1117. There the person engaged in a bribery scheme with the defendant turned into an FBI informer. As a result of his association in crime with the defendant, he had established a relationship under which the defendant felt he could talk freely with him without fear of repetition. We found no constitutional bar to the admission of the incriminating statements of the defendants. In *United States* v. *White* (1971) 401 U.S. 745, 751, the incriminating statement was made to "a police agent who conceal[ed] his police connections," but no invalidity was found in the admission of the undisclosed "police agent's" statement.

In short, there is no case, so far as I can find, which makes any distinction on grounds of constitutional admissibility between incriminating statements testified to by secret informers and by private individuals. Not even the dissenting opinion in *Miller* v. *California*, which incidentally is the only authority cited by the majority opinion in support of its ruling, makes such a distinction. There is no reason to assume that an incriminating statement is any less reliable or trustworthy, if made to an undisclosed informer or undercover agent than if made to a private individual and there is no basis for treating the two situations differently for purposes of admissibility.

I submit that for the reasons given the basis upon which the majority opinion rests its conclusion is untenable, however it may be viewed, and is contrary to authority. As a matter of fact, there are two recent decisions which clearly cannot be reconciled with either the reasoning behind the majority opinion or the result reached in it. The first of these is *United States* v. *Hearst*, *supra*, (563 F. 2d 1331). In *Hearst*, the conversation of the defendant with a prison visitor, unknown to her, was monitored and recorded "surreptitiously" by the prison authorities. This was done because of the jail's policy of monitoring conversations in "very publicized cases or high security problems." [16] The Court emphasized that there was no evidence the visitor had "engaged [the defendant] in the conversation later used against her." The defendant, however, argued that the "deliberate, secret listening" [17]—that is, the "surreptitiously obtaining"—without the presence of counsel violated the defendant's Sixth Amendment rights as established by *Massiah*. In effect, the situation was analogous factually to this case and the position taken by the defendant in that case was similar to that taken by the defendant here. The Court, however, dismissed the claim, stating at p. 1348:

> "The Supreme Court in *Brewer* v. *Williams*, * * * recently interpreted *Massiah* in a manner directly opposed to appellant's contention. In

[16] 563 F. 2d at 1344.

[17] 563 F. 2d at 1347.

Brewer, the Court stated in unambiguous terms that 'no such constitutional protection [of the right to assistance of counsel at the time the defendant made the incriminatory statements] would have come into play if there had been no interrogation.' * * * Relevant to appellant's argument that by secretly listening to incriminating statements the government violated the rights defined in *Massiah*, the Court stated: 'That the incriminating statements were elicited surreptitiously in the *Massiah* case, and otherwise here, is constitutionally irrelevant . . . Rather, the clear rule of *Massiah* is that once adversary proceedings have commenced against an individual, he has a right to legal representation *when the government interrogates him.*' * * * (emphasis added; citations omitted). Thus, under *Massiah*, as interpreted by *Brewer*, there was no violation of appellant's Sixth Amendment right to the assistance of counsel because there was no interrogation of her—either formally or surreptitiously—by the government." (citations omitted)

There is no way to distinguish *Hearst* from this case. The challenged statements were procured secretly and surreptitiously in both cases. In neither case had there been "interrogation," as that term was used in *Brewer* and *Massiah*. Neither Nichols in this case nor Tobin in *Hearst* had engaged the defendant in conversation. It has been suggested that there may be a difference between a *paid* informer reporting a face-to-face admission and testimony from a *paid* government employee who surreptitiously, through the use of electronic surveillance, secures the

incriminating information and that such difference distinguishes this case from *Hearst*. *Wilson* v. *Henderson* (2d Cir. 1978) —— F. 2d ——, 24 CrL. 2105-2106 (decided September 20, 1978), slip opinion pp. 4770-4771, however, gave what appears to me to be the conclusive answer to this suggestion:

> "Furthermore, the admission of an in-custody statement voluntarily made to an informant seems less egregious than the use of a statement intercepted by an electronic eavesdropping device as was upheld in *United States* v. *Hearst*, * * *. When a defendant makes a completely unsolicited, incriminating remark in a face-to-face encounter with an informant, he knowingly assumes the risk that his confidant may ultimately prove to be untrustworthy. In an illegal search and seizure case the Supreme Court stated:
>
> > " '[n]either this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it. *Hoffa* v. *United States*, 385 U.S. 293, 302 (1966).' "

Wilson v. *Henderson* is even more directly in point. In that case the defendant's cellmate agreed "to act as an informant." He was "instructed not to inquire or question, but to keep his ears open for information * * *. The circumstances under which the incriminating statement of the defendant was made are thus described in the opinion:

> "Initially, Wilson (the defendant) repeated to Lee (the cellmate-informer) the same version of the facts that he had related to Cullen (the investigatory officer). Lee's only comment was that the story did not sound too good. By the end of the third day, Wilson made an auricular confession to complicity in the robbery and murder." [18]

The defendant claimed that this incriminating statement "was improperly admitted at trial in violation of his Sixth Amendment right to counsel under *Massiah* v. *United States*, * * *." [19] It is evident that factually this case is on all-fours with our case and that the legal issue is precisely the same. In that case, the Court held, contrary to the majority opinion in this case, that "where Lee did not interrogate Wilson, nor in any way attempt to deliberately elicit incriminating remarks, the rule of *Massiah* [had] not been transgressed." [20] With particular reference to the informer's presence as a cellmate, the Court said (Slip opinion p. 4770):

> "Nor is the fact that the informant was placed in Wilson's cell under surreptitious circumstances a distinguishing point in this case. This court has repeatedly held that a defendant's voluntary, incriminating statements made to a person known by the defendant to be a government officer are properly admissible under *Massiah*. *United*

[18] Slip opinion p. 4761.

[19] Slip opinion p. 4766.

[20] Slip opinion p. 4770.

> *States* v. *Garcia*, [377 F.2d 321]; *United States* v. *Gaynor*, 472 F. 2d 899 (2d Cir. 1973); *United States* v. *Barone*, 467 F. 2d 247 (2nd Cir. 1972); *United States* v. *Maxwell*, 383 F. 2d 437 (2nd Cir. 1972) cert. denied 389 U.S. 1043 (1968); *United States* v. *Accardi*, 342 F. 2d 697 (2nd Cir. 1965) cert. denied 382 U.S. 954 (1965). Ostensibly, comparable statements made to undercover agents should receive similar treatment because the fact that an incriminating statement is received surreptitiously or otherwise is constitutionally irrelevant. *Brewer* v. *Williams*, 430 U.S. at 400."

Certainly, there can be no distinction drawn between this case and *Wilson*. In fact, if anything, the facts in that case were more favorable to the defendant's claim than are the facts in this case. Here, the government agent knew only that Nichols was in the same prison unit as the defendant but, unlike the officer in *Wilson*, he did not know that the defendant and Nichols were cellmates. In *Wilson* it seems the informer was actually placed in the cell with the defendant with the knowledge, if not at the instance, of the investigating officer. That is not true in this case.

The Court in *Wilson* declared that the conduct of the government in that case was not "the type of reprehensible police behavior which the courts feel compelled to discourage. The instructions to Lee suggest a conscious effort on Cullen's part to guard Wilson's constitutional rights while pursuing a crucial homicide investigation. His directions, 'Don't ask

questions; just keep your ears open,' suggest familiarity and attempted compliance with, not circumvention of, the principle of *Massiah*. Under these circumstances, exclusion of Wilson's confession to Lee would serve no useful purpose. Accordingly, we are of the opinion that there was no infringement of Wilson's Sixth Amendment right to the assistance of counsel." [21] That is precisely this case and I suggest we should express the same view here as did the Court in *Wilson*.

In sum, I think *Brewer* plainly declares that without interrogation there is no violation of *Massiah*. This is the construction given *Brewer* in all the comments on that case; it is the construction given it by two Circuit Courts of Appeals. The only authority cited by the majority opinion in contradiction is a dissenting opinion filed years before *Brewer*, written by one of the dissenters in *Brewer*. Without the slightest evidence of any interrogation of the defendant by Nichols in connection with this crime, the majority finds interrogation merely by the presence of the informer in the cell with the defendant. Presence, *whether surreptitious or not*, does not constitute interrogation within *Brewer*. I dissent.

---

[21] Slip opinion p. 4771.

APPENDIX B

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-2338

BILLY GALE HENRY, APPELLANT

versus

UNITED STATES OF AMERICA, APPELLEE

[Filed Dec. 26, 1978]

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the-United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed. The case is remanded to the United States District Court for the Eastern District of Virginia, at Norfolk, for further proceedings consistent with the opinion of this Court filed herewith.

/s/ William K. Slate, II
Clerk

3/1/79: Petition for rehearing filed.

3/30/79: Order denying petition for rehearing filed.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-2338

BILLY GALE HENRY, APPELLANT

versus

UNITED STATES OF AMERICA, APPELLEE

ORDER

[Filed Mar. 30, 1979]

The appellee's petition for rehearing and suggestion for rehearing en banc has been submitted to the court. A poll on the suggestion for rehearing en banc was requested but did not carry. Judge Russell, Judge Widener, and Judge Hall dissent from the denial of rehearing en banc.

IT IS FURTHER ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Winter.

For the Court,

/s/ William K. Slate, II
Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 75-453-N

BILLY GALE HENRY, PETITIONER

vs.

UNITED STATES OF AMERICA, DEFENDANT

MEMORANDUM ORDER

This civil action was remanded to this court by the Fourth Circuit Court of Appeals, with direction that the plaintiff be given an opportunity to file an amended petition to set forth any and all grounds upon which he seeks relief. An amended petition or complaint ws received by the Clerk on June 29, 1977. The United States has responded denying the allegations. The amended complaint raises the following 10 separate issues:

1. Probable cause did not exist for the issuance of an arrest warrant.
2. A denial of the right to counsel because of a questioning conducted by an FBI agent after arrest.
3. Denial of the right to counsel on the allegations that informers were agents of the United States during their interview with plaintiff while he was in confinement.

4. Knowingly using perjured testimony.

5. Competency to stand trial destroyed by jail conditions.

6. Failure to disclose material evidence.

7. Suppression of material evidence through non-disclosure.

8. Denial of a competency hearing.

9. Illegal search of the residence at Wailes Avenue.

10. Imposition of an illegal sentence.

In addition to the above amended complaint, while this Civil Action #75-453-N was on appeal to the Fourth Circuit Court of Appeals, the defendant filed a motion for a new trial in Criminal Action No. 72-243-N, the conviction which he attacks by his habeas proceedings. Action on that motion was stayed pending decision by the Court of Appeals of the civil action.

In the motion for a new trial Henry asserts he has discovered new evidence. He attaches an affidavit of one John Paul Smith. In the affidavit Smith asserts that he was a participant in the bank robbery of the United Virginia Bank at Janaf Shopping Center, Norfolk, on August 28, 1972, the robbery for which Henry was convicted and which he now attacks. Smith asserts in the affidavit that he entered the bank shortly after 9:00 a.m. on August 28, 1972, with one other person while a third person waited in the car in front of the bank; that he vaulted the counter of the head teller's cage and after a struggle removed two duffel bags of night deposits; that only two other persons were involved and that Henry was not one of them; that Henry had no

knowledge of the robbery and in no way participated therein; and that Henry was a business associate of his and never had knowledge of any crimes.

The motion for a new trial filed in the criminal action and the habeas corpus proceedings are consolidated and are dealt with in this order.

I.

We commence with the principle that this habeas corpus proceeding is a civil one, and that the burden is upon the plaintiff of showing a substantial constitutional deprivation. *Johnson* v. *Zerbst*, 304 U.S. 458, 469 (1938); *Clayton* v. *Haynes*, 517 F.2d 577 (4 Cir. 1975). In the *Johnson* case the Supreme Court pointed out that it must be remembered a judgment could not be lightly set aside by collateral attack even on habeas corpus; that when collaterally attacked the judgment of the Court carries a presumption of regularity.

II.

United States v. *Williams*, 415 F.2d 232 (4 Cir. 1969) sets forth the requirements of a motion for a new trial based on the grounds of newly discovered evidence as follows:

(a) It must appear from the motion that the evidence relied on is, in fact, newly discovered, that is, discovered after the trial.

(b) The motion must allege facts from which the Court may infer diligence on the part of the movant.

(c) The evidence relied on must not be merely cumulative or impeaching.

(d) It must be material to the issues involved; and

(e) Must be such as, on a new trial, would probably produce an acquittal.

The evidence at the robbery trial overwhelmingly establishes Henry as a participant.[a] Henry's associates in the instant bank robbery were Moore and Luck. Moore and Luck were tried prior to the time of Henry's trial and conviction. They were clearly and fully identified as the other two parties who participated in the robbery, were convicted, their convictions affirmed on appeal, and they are now serving their sentences. Moore and Luck were found in possession of the funds removed from the bank, the equipment and facilities used in the robbery and clearly identified as associated with Henry. The affidavit of Smith is not worthy of belief. The Court is not required to and does not believe Smith, and there is no truth in the statements in the affidavit.

Under all the facts and circumstances in the case, if Smith were to appear and testify in accord with the affidavit and it would be highly unlikely he would do so—it would not change the outcome of the case. In passing, the Court merely notes that Smith in his affidavit states that Henry was a business associate of his "and never had knowledge of any crimes." The statement that Henry never had knowledge of any crimes is so preposterous that no one would accept it as true, for Henry, in a signed letter

[a] See detailed facts hereafter set out.

addressed to the United States Attorney for the Eastern District of Virginia, received July 19, 1977 from Leavenworth, Kansas, concerning these cases sets forth "I've spent most of my adult life in prison —it is no longer punishment, it i 'a way of life'." Smith does not seem to know the individual to whom he spoke.

This motion is DENIED.

III.

Turning to the habeas complaint, the issues will be dealt with in the order in which they were set forth in the complaint.

1. Henry complains that he was illegally arrested because probable cause did not exist for the issuance of a warrant of arrest. A warrant for his arrest was sworn out in Norfolk, Virginia, on September 22, 1972, before the United States Magistrate charging him with bank robbery by force. The complaint was based on information furnished by FBI Agent O'Hara. It sets forth that Henry was identified as the individual who rented a residence at 6420 Wailes Avenue, Norfolk, under the name of Allen R. Norris. On August 23, 1972,[1] a rental receipt for said premises in the name of Allen R. Norris was recovered from an abandoned 1967 Ford automobile following the robbery. It was identified as the getaway car

[1] This is the house where Luck and Moore were found, with all of the funds from the bank robbery, on the morning following the robbery.

in the robbery. Henry had been positively identified as using the name of Allen R. Norris and Robert A. Norris, and had been identified as being with Luck and Moore. Henry contends such information does not establish probable cause. In his complaint Henry contends that Agent O'Hara made oath he had seen Henry in the company of Moore and Luck. The record is absolutely to the contrary. O'Hara's affidavit set forth that Henry had been identified as being with Luck and Moore.

The sole issue is whether there is probable cause for detaining the arrested person pending further proceedings. The standard is "probable cause to believe the suspect has committed a crime" to be determined by a Magistrate in a nonadversary proceeding on hearsay and written testimony. It does not require appointed counsel. *Gerstein* v. *Pugh*, 420 U.S. 103 (1975). The test is whether the information and knowledge of the facts are trustworthy and sufficient to warrant a prudent man in believing that the person had committed an offense. In *Draper* v. *United States*, 358 U.S. 307, 313, the Court said:

> "In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal techncians, act." Brinegar v. United States, supra, at 175. Probable cause exists where "the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed. Carroll v. United States, 267 U.S. 132, 162.

But even where a defendant is arrested without probable cause, "a conviction will not be vacated on the grounds that the defendant was detained pending trial without a determination of probable cause." *Gerstein* v. *Pugh, supra,* at page 119. Illegal arrests or detention do not void a subsequent conviction, *Gerstein* v. *Pugh, supra*; *Frisbie* v. *Collins*, 342 U.S. 519 (1952); *Ker* v. *Illinois*, 119 U.S. 436 (1886).

2. Defendant Henry was arrested in Atlanta, Georgia, and transferred to the custody of the Marshal in the Eastern District of Virginia. While he was in the Marshal's office being processed, FBI Agent O'Hara entered the office, saw Henry and then identified himself. He asked Henry if he could talk to him. Henry replied in the affirmative. Later, agent O'Hara and another agent went to the jail cell in the Norfolk City Jail where Henry was confined, and after further identifying himself and giving Henry the *Miranda* warnings, proceeded to interview him. At the time of trial, out of the presence of the jury, the Court heard the evidence concerning the voluntariness of any statement allegedly made by Henry. Henry was permitted to and did testify before the Court concerning the voluntariness of the interview. He clearly admitted that he was given the full *Miranda* warnings, was not threatened or mistreated in any way, and that he voluntarily con-

ferred with the agent. The Court made a finding in the record that the statements made by Henry were freely and voluntarily made. He denied any connection with the bank robbery. The statement was thereafter presented for consideration by the jury. Henry was advised fully of his right to testify at his trial and further advised that he could testify on the issue of the voluntariness of his statement, and that if his direct testimony was limited to the issue of the voluntariness of the statement, any cross-examination would likewise be limited to that issue. He did not choose to testify either on that issue or in his own defense.

Not only was the statement voluntarily given, but if there is any error in its admission or as to its voluntariness, the error was a matter to be challenged in a direct appeal.[2] Having once been given a full opportunity to raise the question, he is not entitled to collaterally attack it. The Supreme Court made this perfectly clear in *Wainwright* v. *Sykes*, —— U.S. —— (June 1977), and it was clearly decided by the Fourth Circuit in *Allen* v. *United States*, —— F.2d

[2] "Errors in the admissibility of evidence are "not cognizable upon collateral attack . . ." *Neeley* v. *United States*, —— F. 2d —— (4 Cir. No. 75-2368) 12/23/76. In *Neeley* the same issue was raised of suppression of evidence of a lineup. The Court pointed out that Neeley, having participated in the lineup, was well aware it had been conducted "and it became his attorney's duty to elicit on cross-examination the facts which would be favorable to his client's case." Henry admits he participated in the interview and did so voluntarily. Having participated, he was well aware the interview had occurred.

——, No. 75-2010, decided February 3, 1977, where the Court said that "It is well settled that the statutory remedy provided by § 2255 cannot be used as a substitute for a motion for a new trial nor for an appeal." Citing *Houser* v. *United States*, 508 F.2d 509 (8 Cir. 1974); *Taylor* v. *United States*, 229 F.2d 826 (8 Cir. 1956). Further, the issue deals with the admissibility of evidence which the Court said in the Allen case "are not cognizable upon collateral attack and lack merit for consideration otherwise."

Henry was brought to the Marshal's office in Norfolk on November 21, 1972. He did not then have counsel. He had not been arraigned. Counsel was appointed for him on November 27, 1972.

But even if it could be said by any stretch of the imagination that this evidence was improper, it would clearly fall within the rule of harmless error.

3. Henry asserts that when he arrived in Norfolk in custody of the United States Marshal, he saw Agent O'Hara, of the FBI, in the Marshal's office; that he (Henry) discussed with the Marshal the possibility of being housed with Luck and Moore, his associates in the bank robbery; that O'Hara stated he would be put in another jail; that he was housed with Agent/Informer Nichols, at the request of the FBI, and that Nichols questioned him concerning the bank robbery with which he was charged; and that Nichols was released from the Norfolk City Jail with the help of the FBI and other federal authorities.

FBI Agents O'Hara and Coughlin have filed affidavits in this action. O'Hara was in charge of the

investigation of the bank robbery with which Henry was charged, and was assisted by Agent Coughlin.

Henry was first jailed in Norfolk on November 20, 1972, and was interviewed by Agent O'Hara on November 21, 1972, after being fully advised of his rights. On November 21, 1972, Coughlin contacted Nichols at the Norfolk City Jail. Nichols had previously, over a period of about four years, provided information to the FBI, and had been paid for his services in doing so. Nichols had been in jail since about June, 1972 on state charges of forgery. He told Coughlin he was in the same cell block as Henry, as well as other federal prisoners awaiting trial. He was told by Coughlin to be alert to any statements made by them, and if they engaged him in conversation or talked in front of him, to pay attention to their statements. He was told not to initiate any conversation with Henry, but if Henry conversed, to pay close attention to him. Coughlin again contacted Nichols on December 6, 1972. Nichols had then been released from the Norfolk City Jail. Nichols related that Henry had engaged him in conversation, and requested his assistance. Henry told him about the bank robbery charges; that he (Henry) knew Nichols was getting out soon, and he wanted Nichols to contact a woman in Virginia Beach, known as "Hink"; that Henry had prepared information on where she lives, and he wanted her to come to the jail to see him and act as a go-between between Henry and his partners, who were then supposed to be in the Portsmouth City Jail. He told Nichols about how the bank

robbery occurred. Henry also asked Nichols to make a call to one "Junior" or "Nail", and gave Nichols the telephone number. Henry requested Nichols to obtain a hand-cuff key and floor plan of the Norfolk City Jail and the U.S. Marshal's Office. Further, he asked Nichols to keep in contact with him after his release from jail. Nichols made contact with the female named "Hink" on December 7, 1972. He was paid by the FBI for furnishing this information.

Coughlin states he never requested anyone affiliated with the Norfolk City Jail to place Nichols in a cell with Henry, never sought to have Nichols placed in the same cell with Henry, nor had he contacted anyone in the Norfolk City Jail, Portsmouth City Jail or United States Marshal's Office to have Henry lodged in a specific jail. He says he never interceded with anyone on behalf of Nichols to have him released from jail, and his belief was Nichols was being released because he was due to be released.

He states he specifically told Nichols not to question Henry in regard to the bank robbery.

Agent O'Hara filed an affidavit in which he states he was aware Coughlin obtained information from Nichols; that Nichols was not directed at anytime to solicit information from Henry, either by Coughlin or himself. He said he did not contact any Norfolk or Portsmouth jail authorities or the United States Marshal's Office to arrange for any particular cell mate for Henry.

At time of Henry's trial, Nichols testified that he had told FBI Agent Coughlin of the statements made by Henry; that he was not requested by Coughlin to ask questions of Henry, and that Coughlin did not tell him "anything about the bank robbery at the Janaf Branch of the United Virginia Bank on August 28, 1972." (Tr. page 135) Since the information which Nichols testified to was in general correct, he must have received it from Henry. Nichols said that Henry told him "that the only thing to connect him to the bank was a rent receipt of a house he had rented.[3] Nichols was cross-examined. He related he had furnished the information to Coughlin, that he had been convicted of a felony; and that he had been released from jail.[4] It is apparent that counsel did not pursue examination of Nichols on how or why he was released from jail, for the jury had heard he furnished information about what Henry had said in November-December, 1972, and was out of jail in March, 1973. Counsel for defendant could and probably did, argue Nichols was rewarded for his testimony by his release from jail.

---

[3] This information was correct. The rent receipt was found in the escape car, which had been abandoned about a mile from the bank. It gave the address of the house Henry was identified as having rented under the name of Norris. It led the officers to the house where Luck and Moore were arrested with the money and checks taken from the bank, and the guns, clothing, masks and other equipment used in the robbery. Henry, the third party in the robbery, dropped Luck or Moore off at the house and went back to Atlanta.

[4] The trial at which Nichols testified was on March 7, 1973.

While Henry says the facts bring this case within the holding of *Massiah* v. *United States*,[5] 377 U.S. 201 (1964), it is clear the facts are entirely different. Here, the evidence clearly shows Nichols was not employed to question Henry or to seek information from him, but to merely report what he heard. There is no requirement an accused be furnished counsel when he wishes to shoot off his mouth. Here, the Court accepts the statements of the FBI agents that they did not request Nichols to question Henry or engage him in conversation, but only to listen to any statements Henry might make within their hearing and report it to them. Nichols confirms this. Further, the allegation that the FBI had any part in where Henry was housed, or in having him placed in any particular jail or cell, and the placing of Nichols in the cell with him is clearly untrue.

Too, even assuming evidence should not have been admitted, there was no objection, and the objection therefore now comes too late. Error in the admission of evidence is not a proper issue to be raised in a § 2255 action. *Allen* v. *United States*, *supra*;

---

[5] In *Massiah*, the Court held that evidence of a defendant's own incriminating words "which federal agents had deliberately elicited from him after he had been indicted and in the absence of counsel," could not be used against him. (377 U.S. 206) Further, *Massiah* dealt with the admissibility of evidence, objected to, on direct appeal and not a collateral attack on its admission. At trial, the witness was not asked whether he had been requested to seek information from Henry, whether he was asked to seek out Henry for information, etc.

Neeley v. *United States*, 405 F.Supp. 1186 (D.C. W.Va. 1975), *aff'd.* 532 F.2d 751 (4 Cir. 1976); *Houser* v. *United States*, 508 F.2d 509 (8 Cir. 1974); *Chishom* v. *United States*, 510 F.2d 356 (8 Cir. 1975) and cases there cited; *Cauley* v. *United States*, 294 F.2d 318 (9 Cir. 1961).

In considering all of the facts of the case and the assertions made by the complaint, even if it be conceded there was error in the admission of the testimony of Sadler and Nichols, the error was harmless. Without contradiction of any fact or circumstance, Henry was clearly identified by eyewitnesses as one of the bank robbers; he was identified as the individual who rented the Wailes Avenue house and who paid the rent thereon and received the receipt therefor. His fingerprints were found on the receipt and lease. He was identified as being at the house before the robbery and as the one who purchased the getaway car. He was clearly observed in the area, and in the presence of Luck and Moore, the other two bank robbers. While the burden is on the United States to establish the guilt of a defendant beyond a reasonable doubt, once this is done, where none of the facts are refuted by any testimony or circumstances, the admission of evidence without which the guilt is clearly established should not permit such guilty person to escape or be granted a new trial. As the Court said in *Harrington* v. *State of California*, 395 U.S. 250, 254 (1969), in dealing with the admission of evidence alleged to be error, "apart from them (meaning the alleged improper items of evidence)

the case against Harrington was so overwhelming that we conclude that the violation of *Bruton* was harmless beyond a reasonable doubt, unless we adopt the minority view in *Chapman* (386 U.S. 42-45) that a departure from constitutional procedures should result in an automatic reversal, no matter the weight of the evidence." See also *Wilcox* v. *United States*, —— F.2d —— (4 Cir. 9/14/77).

4. Henry asserts the government made use of perjured testimony when it called Joseph Sadler as a witness against him. In order to vacate a conviction on the allegations of the use of perjured testimony, the party seeking relief carries the burden to establish it was false, material, and knowingly and intentionally used by the prosecution. *McBride* v. *United States*, 446 F.2d 229, 232 (10 Cir. 1971), *cert. denied*, 405 U.S. 977 (1971); *Thompson* v. *Garrison*, 516 F.2d 986 (4 Cir. 1975); *Allen* v. *United States*, —— F.2d —— (4 Cir. No. 75-2010, 2/3/77); *Green* v. *United States*, 313 F.2d 6 (1 Cir. 1971); *Elliott* v. *Berto*, 474 F.2d 856 (5 Cir. 1973), *cert. denied*, 411 U.S. 985; *Anderson* v. *United States*, 403 F.2d 451 (6 Cir. 1968), *cert. denied*, 394 U.S. 903; *Holt* v. *United States*, 303 F.2d 791 (8 Cir. 1962), *cert. denied*, 372 U.S. 970; *Hallman* v. *United States*, 490 F.2d 1088 (8 Cir. 1973); *Marcella* v. *United States*, 344 F.2d 876 (9 Cir. 1965), *cert. denied*, 382 U.S. 1016; *Oyler* v. *Taylor*, 338 F.2d 260 (10 Cir. 1964), *cert. denied*, 382 U.S. 847; *Thornton* v. *United States*, 368 F.2d 822 (D.C. Cir. 1966); *Hysler* v. *Florida*, 315 U.S. 411 (1942); see also

Pyle v. *Kansas*, 317 U.S. 213 (1942); *Hammond* v. *United States*, 309 F.2d 935 (4 Cir. 1962); *Harrison* v. *Bowles*, 307 F.2d 928, 933 (4 Cir. 1962).

Henry relies upon an affidavit of one Joseph Ray Conway, dated April 13, 1973. In it Conway says he was in the same cell with Henry and Sadler at the Norfolk City Jail; that Sadler told him that he could not stand going back to prison, and that to avoid it he would tell the FBI that Henry robbed the United Virginia Bank at Janaf Shopping Center; that he knew Henry had not admitted robbing the bank but he would tell the FBI anyway, and that they would keep him from going to prison; and that he would do anything to get back on the street.

The Conway affidavit does not reveal when the alleged discussion between Conway and Sadler was supposed to have occurred, or when Conway passed the information to Henry. Sadler was in the cell in the Norfolk Jail with Henry from November 24 through about the middle of December, after which Henry was transferred to the Portsmouth City Jail.

Henry's trial was scheduled for and held March 7, 1973. Sadler contacted Agent O'Hara and O'Hara interviewed him February 28, 1973 at the Norfolk City Jail. At that time Sadler advised O'Hara what he had heard Henry say about the bank robbery. At the trial Sadler testified he had not talked to Agent O'Hara before Henry told him of his activities in connection with the bank robbery; that he had not been requested to question Henry and that O'Hara had not arranged for him to be placed in a cell with

Henry. Further, he said he had not been promised any help in exchange for his testimony, and that at time of trial, he was still in custody.

Sadler testified he expected to be released from jail on probation, and that Henry had asked him to contact a man named Garland Holloway, a friend of Henry's.

O'Hara stated he had never asked Sadler to obtain any information from Henry, and that Sadler furnished the information voluntarily. The statement of Conway is not believable.

Plaintiff's allegation that perjured testimony was knowingly used is without any credible evidence to support.

First, there is no sufficient showing that Sadler testified falsely. Secondly, there is no evidence the United States Attorney, the FBI or others in authority knew or had any reason to believe the testimony was untrue, and hence it could not have knowingly and intentionally used false or perjured testimony. Again, even if it error, it was harmless error. In *Wilcox* v. *United States*, *supra*, the same charge was made and held harmless. That too was a bank robbery, and the defendant claimed in his habeas action the use of false testimony regarding the extent of a bargaining for testimony. In disposing of the matter, the Court said "A review of the record clearly indicates that assuming Wilcox's allegation was true, any error was harmless beyond a reasonable doubt," [page 3, slip opinion] as the bank teller "positively identified Wilcox as one of the rob-

bers." In the case at bar, Henry was positively identified as one of the robbers, as the purchaser of the getaway car, as the one who rented the "hideaway" house, not only by sight, but by his fingerprints.

5. Grounds No. 5 and 8 are combined and discussed together. Henry complains that his competency to stand trial was destroyed by the conditions of the jail where he was confined, and that the Court should have ordered a competency hearing for him. He asserts he was denied proper medication by the jail physician. After inquiry by the United States Marshal the jail physician advised the Marshal in writing of the request from Henry for treatment and of the treatment given. A hearing was held on Henry's complaint that he was being denied proper medication. His sole assertion was that he needed the use of nerve pills. The jail physician testified that when he first saw Henry he was suffering from high blood pressure and that under his medication Henry's blood pressure was reduced to normal. He said there was no need for any type of nerve pills, but only that Henry continue with the medication given. The record of the hearing on that motion clearly establishes that Henry made no application for any type of psychiatric examination. At page 23 of the transcript of that hearing held February 7, 1973, with Henry present, his counsel stated concerning the request for treatment "it is not a request for a psychiatric examination . . . . it does not have anything to do with the man's capacity to

stand trial or be helpful to counsel." At no time was there a request for a psychiatric examination of the defendant, nor did he at any time suggest he was in need of treatment or examination for his mental condition, nor was there any suggestion he was not fully competent to stand trial and cooperate with his counsel. No evidence was presented on behalf of the defendant at trial, nor at any other time, to suggest that he was not mentally competent to stand trial. In view of the statement of Henry's counsel on February 7 in the presence of Henry, if the Court ordered a mental examination it would seem it would be in disregard of the decision of the Fourth Circuit in *United States* v. *Terry*, 506 F.2d 1399 (4 Cir. 1974). *See also Hawks* v. *Peyton*, 370 F.2d 123, 125 (4 Cir. 1966).

6. Grounds 6 and 7 are combined and dealt with together. Here, the complaint is the United States failed to furnish him with *Jencks* Act material when it did not furnish him with information obtained by Agent O'Hara at an interview with Henry and, further that there was a suppressing of material evidence through nondisclosure. Such questions are not cognizable in a § 2255 proceedings. *Allen* v. *United States, supra; Harrison* v. *Baker, supra.*

By no stretch of the imagination could the alleged statement made by Henry to O'Hara be considered *Jencks* Act material. It was not reduced to writing nor recorded by any recording device, nor did it in any respect come within the provisions of the *Jencks* Act. Henry could not have been taken by surprise

for he clearly remembered the occasion and the interview. Notes made by a witness of his activities are not *Jencks* Act statements. *United States* v. *Atkinson*, 513 F.2d 38 (4 Cir. 3/11/75); *United States* v. *Palermo*, 360 U.S. 343 (1959); *Goldberg* v. *United States*, 425 U.S. 94 (1976). In dealing with the issue of furnishing information not requested, the Supreme Court pointed out in *United States* v. *Agurs*, 427 U.S. 97 (1976), that it had not held the government must produce for the defendant exculpatory information not requested and that it is not sufficient for an objection for failure so to do to establish the possibility it might have aided the defendant. In determining the materiality, the Court said that only if the omitted evidence created a reasonable doubt of guilt that did not otherwise exist, was error committed.

7. As grounds No. 9, Henry asserts that there was an illegal search of the residence on Wailes Avenue in which Luck and Moore were found and which was shown to have been leased by him. He also asserts there was an illegal search of the Ford Ventura automobile used by the robbers in making their getaway, and in which the receipt for the rent of the Wailes Avenue house was found. The same evidence presented to suppress evidence obtained in these searches was presented in the Moore and Luck criminal trials. It was there ruled on by Judge Hoffman of this Court, and his ruling affirmed on appeal. The reasoning and facts set forth in that ruling were adopted in this case.

Henry sought to deny he had possession or control over either the Ford automobile or the residence. Without some right to possession or control over either of them it would seem he lacks a standing to challenge the alleged illegal search of either.[4] Here, not only is this a sufficient reason not to suppress the use of the evidence, but the facts clearly justify the search.

The Ford Ventura was the escape car. It was abandoned about 1/2 mile from the scene of the robbery and the robbers transferred to another car. It was found abandoned in a public street. Pursuit, and search of that car led the police to the Wailes Avenue residence. Moore was observed in the residence, as were guns. He exited the residence and was placed under arrest. Luck was also seen through the window of the residence and ordered to come out. It was reasoned the third robber was still in the house. The police entered in pursuit of that party. In open view as they entered the house were the proceeds of the robbery, cash and checks, numerous guns, the signal devices used by the robbers and other paraphernalia.

The Court heard and ruled on the motion to suppress the evidence. The motion was denied. It was

---

[4] Suppression of the products of a Fourth Amendment violation can be successfully urged only by one whose rights were violated by the search itself, not one injured solely by the introduction of the evidence obtained. He must establish he was the victim of an invasion of his privacy. Henry contended he had no connection with the house or car. See Jones v. United States, 362 U.S. 257 (1960); Alderman v. United States, 394 U.S. 165, 131-2-3 (1969).

raised on appeal and the ruling of the trial court affirmed. Having been given a full opportunity to raise these issues at trial, and they having been raised and ruled on, and having had the opportunity to raise them on appeal, it comes too late to collaterally attack them. *See Allen* v. *United States*, *supra*. In *Neeley* v. *United States*, —— F.2d ——, No. 75-2368 (4 Cir. decided 12/23/76), the Court said that "Error in the admission of testimony at trial (is an) improper ground upon which to base a claim for post-conviction relief in a proceeding under § 2255." See cases there cited.

As to the search of the automobile, in *South Dakota* v. *Opperman*, —— U.S. —— (7/6/76), the Court pointed out that it had traditionally drawn a distinction between the search of automobiles and homes in relation to the Fourth Amendment because of the inherent mobility of the automobile creating circumstances preventing the rigorous enforcement of the requirement of obtaining a warrant, and secondly, the expectation of privacy is diminished by the obvious public nature of automobile travel. Further, when automobiles are impounded by local police, as was the case here, a search is necessary for the protection of the owner's property while in the custody of the police, protection of the police against claims and disputes, and protection of the police from potential danger. The automobile in this case was seized in a public street and as such "did not involve any invasion of privacy." *G. M. Leasing Corporation* v. *United States*, 429 U.S. 338 (1977).

The law enforcement officers were in pursuit of the bank robbers and such pursuit led them to the Wailes Avenue residence. They were seen through the window. By entering the premises in search of the third person, such entry was in hot pursuit and did not constitute a violation of privacy. In fact, the two robbers, Moore and Luck, came out of the house. In entering the house the items seized were in plain view. As the Court said in *United States* v. *Santana*, 427 U.S. 38, 42 (1976), "What a person knowingly exposes to the public, even in his own house or office, is not a subject of Fourth Amendment protection." Further, in the *Santana* case, *supra*, the Court said that in *Warden* v. *Hayden*, 387 U.S. 294 (1967), "we recognized the right of police, who had probable cause to believe that an armed robber had entered a house a few minutes before, to make a warrantless entry to arrest the robber and to search for weapons."

8. Lastly, Henry contends that the sentence imposed was illegal. He says that on March 12, 1975, he was designated as a "special offender," that when he inquired as to the reason, he was informed it was because of information received from the Court and court officials.

The sentence imposed by the Court was a straight sentence. Nothing in the sentencing order or in the sentencing proceedings refers to any "special offender." If the prison authorities are imposing unusual restrictions on Henry, that issue is not now before the Court.

Henry is not entitled to the relief prayed for. His complaint is DENIED and DISMISSED.

IV.

Henry propounded several sets of interrogatories to be answered by Agent O'Hara, Clarence Kelley, the Director of the FBI, a supervisor of the FBI, Agent Coughlin and others. He filed request for production of documents by the Assistant United States Attorney, for production of the trial transcript in the case of *United States* v. *Luck* and *Moore*, and all tangible evidence of the alleged crime, as well as request for admissions of fact by the United States Marshal, Sheriff John Doe of the Norfolk City Jail, the Assistant United States Attorney, Sheriff Owens of Portsmouth and Agent O'Hara. The United States moved to quash asserting that these persons were not parties to this suit and not subject to such procedures. Even if it be conceded that they were required to respond, the answers, admissions and items sought were not proper for consideration in this case, and they are DENIED.

V.

On August 9, 1977, Henry filed a motion for the undersigned to recuse himself from this case on the grounds that the Court had made prejudicial decisions in the past in dismissing the civil rights suits filed by him, denying information sought by him, denying his motion to vacate sentence and denying

the motion to suppress and in the admission of evidence at trial.

Since there were numerous suits filed by Henry, as well as numerous motions in the criminal proceedings and the habeas proceedings, one would be delighted to escape the necessity of reviewing all of these papers and pleadings, but there has been no showing of any proper reason for this Court to recuse itself and place the burden of dealing with this case upon some other judge. The motion is DENIED.

VI.

Henry may appeal in forma pauperis by filing notice of such intention with the Clerk of this court, at Norfolk, Virginia, within 60 days from this date and following the procedures prescribed by law.

/s/ [Illegible]
United States District Judge

Norfolk, Virginia
October 11, 1977

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 75-453-N

BILLY GALE HENRY, PLAINTIFF(S)

vs.

UNITED STATES OF AMERICA, DEFENDANT(S)

JUDGMENT

This action came on for consideration by the Court, and the issues having been duly considered and a decision having been duly rendered,

It is ADJUDGED and ORDERED that this action be dismissed.

W. FARLEY POWERS, JR.
Clerk

/s/ Beth T. Wingrove
Deputy Clerk

Date: October 11, 1977

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 75-2142

BILLY GALE HENRY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the Eastern District of Virginia, at Norfolk
Richard B. Kellam, District Judge

Submitted: March 14, 1977 Decided: March 29, 1977

Before WINTER, CRAVEN and BUTZNER,
Circuit Judges

(Billy Gale Henry, Appellant *Pro Se.* Hunter W. Sims, Assistant United States Attorney, for the Appellee.)

PER CURIAM:

Billy Gale Henry initiated a petition in the district court alleging several grounds in support of a motion to vacate the sentence that he received upon a jury's verdict that he had committed armed bank robbery. The district court denied the motion without requiring a response from the government or conducting an evidentiary hearing. Henry has appealed.

Two of Henry's claims do not warrant relief. He alleged that several of the prosecutor's statements during the course of argument were so prejudicial as to deprive him of a fair trial; review of the trial transcript, however, indicates that when read in context the prosecutor's statements were not so prejudicial as to warrant vacating the sentence. *Compare United States* v. *Gambert*, 410 F.2d 383 (4th Cir. 1969); *with United States* v. *Sawyer*, 347 F.2d 372 (4th Cir. 1965). Henry also characterized some of the testimony against him as hearsay, implying that it should not have been admitted; since the testimony concerned his own statements to the witnesses testifying, however, it was not inadmissible hearsay.

Another of Henry's claims is not so readily dismissed. He alleged that one of the witnesses against him had not disclosed to Henry that he was acting as a government agent during conversations between them in jail after Henry's arrest. Because Henry's attorney was not present during those conversations and Henry had not knowingly and intelligently

waived his right to have his attorney present, questioning under such circumstances would be violative of his rights under the Sixth Amendment. *Massiah* v. *United States*, 377 U.S. 201 (1964). The witness denied at trial that he asked Henry specific questions at the direction of a certain government investigator (Tr. at 135), but that testimony does not refute Henry's claim that the witness worked as a paid informant for the government on a continuing basis and that he was paid for obtaining evidence against Henry. It is therefore necessary to conduct an evidentiary inquiry to determine whether the witness was acting as a government agent during his interviews with Henry, since the records do not "conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255.

Henry's petition to the district court also stated another claim that warranted further inquiry. He alleged that another witness against him at trial had told a cellmate that he would give whatever false information he could against Henry in order to get himself out of jail. Henry also alleged that the government arranged to have that cellmate removed from the jail where Henry was confined prior to trial in order to prevent Henry from discovering that perjured testimony might be used against him. Proof of such allegations would establish that Henry's conviction was unconstitutional under both *Brady* v. *Maryland*, 373 U.S. 83 (1963) (government suppression of exculpatory evidence), and *Miller* v. *Pate*, 386 U.S. 1 (1967) (knowing use of perjured testimony). Therefore, they require an evidentiary in-

quiry since the record does not show them to be meritless.*

In his petition to the district court, Henry also asserted several other grounds for vacating his sentence. Those claims, which were generally stated in a conclusory manner, concerned Henry's competence to stand trial, the effectiveness of his trial counsel, and the government's compliance with a pretrial discovery agreement. In connection with the present appeal, Henry has filed numerous supplemental statements which supply more detail for his claims. Because those detailed allegations were not made to the district court, they are not properly before this Court on appeal. Nevertheless, in order to avoid later repetitious review of fresh petitions from the same prisoner, *see Sanders* v. *United States*, 373 U.S. 1 (1963), it would be appropriate for the district court to permit Henry to develop those additional claims at the same time that it examines the issues for which an evidentiary hearing is otherwise necessary.

Accordingly, the judgment of the district court is affirmed in part and reversed in part. The case is remanded for further proceedings in accordance with the views expressed herein.

---

* The district court dismissed those claims in part because Henry's inartful *pro se* petition implied that they had been presented to this Court during the direct appeal of his conviction. *United States* v. *Henry*, No. 73-1413 (4th Cir., Sept. 14, 1973). Review of the materials filed in connection with that appeal discloses no mention of the claim, however.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 75-453-N

(Cr. #243-72-N)

BILLY GALE HENRY, PLAINTIFF

vs.

UNITED STATES OF AMERICA, DEFENDANT

STATE OF VIRGINIA

CITY OF NORFOLK, VIRGINIA

I. Gerald T. Coughlin, being first duly sworn, depose and say as follows:

1. I am a Special Agent of the Federal Bureau of Investigation (FBI) assigned to the Norfolk, Virginia, Division of the FBI. I participated in the investigation of the bank robbery of the United Virginia Bank/Seaboard National, Janaf Branch, which had occurred in Norfolk, Virginia, on August 28, 1972.

2. On November 21, 1972, I contacted Edward Benjamin Nichols at the Norfolk City Jail. Nichols had been contacted by me for approximately a year prior to this and during my contacts with him, he had provided confidential information to the FBI. Nichols had been paid by the FBI for expenses and services in connection with information he had provided on these previous occasions.

On November 21, 1972, Nichols was contacted at the Norfolk City Jail by me. I believe that he had been incarcerated there since approximately June, 1972, on forgery charges brought by the City of Norfolk, Virginia. At this time, Nichols advised that he was in the same cellblock as Billy Gale Henry as well as with other prisoners who had Federal charges against them. I recall telling Nichols at this time to be alert to any statements made by these individuals regarding the charges against them. I specifically recall telling Nichols that he was not to question Henry or these individuals about the charges against them, however, if they engaged him in conversation or talked in front of him, he was requested to pay attention to their statements. I recall telling Nichols not to initiate any conversations with Henry regarding the bank robbery charges against Henry, but that if Henry initiated the conversations with Nichols, I requested Nichols to pay attention to the information furnished by Henry.

On December 6, 1972, I again contacted Nichols. I believe Nichols at this time had been released from the Norfolk City Jail. Nichols related the following information: Nichols told me that Billy Gale Henry had engaged him in conversation while he was in jail with Henry. Henry had requested Nichols' assistance. Also, Henry had talked to Nichols about the bank robbery charges against him. Nichols stated that Henry knew that Nichols was getting out of jail shortly and that Henry wanted Nichols to go to the City of Virginia Beach for him and to contact a

woman called "Hink". Henry had prepared instructions for Nichols on where this woman lived and wanted Nichols to tell this woman to come see him in the jail. Henry told Nichols he wanted to use this woman as a go-between with his partner, who was in the Portsmouth City Jail. Also, Henry related to Nichols that he and his partner had been looking at the Janaf bank for some time and went on to describe how the bank robbery occurred. Henry also requested Nichols to make telephonic contact for him with an individual by the name of "Junior" or "Nail." Henry provided Nichols with a telephone number. Henry also requested Nichols to obtain a handcuff key and floor plans for the Norfolk City Jail and the U. S. Marshal's Office, inasmuch as Henry wanted to break out of jail. I also recall Nichols advising me that Henry had requested Nichols to maintain contact with him, after Nichols was released from jail. Nichols advised he would comply with Henry's request and report the information to the FBI.

Nichols went ahead with Henry's request and made contact with the female by the name of "Hink" in the City of Virginia Beach on December 7, 1972.

Nichols was paid by the FBI for expenses and services in connection with the requests of Henry, and for the information furnished by Nichols.

I never requested anyone affiliated with the Norfolk City Jail to place Edward Benjamin Nichols in the same cell with Henry. I never sought to have Billy Gale Henry placed in the same cell with Nichols. I never contacted anyone in the Norfolk

City Jail, Portsmouth City Jail or U. S. Marshal's Office to have Henry lodged in a specific jail. I never interceded with anyone in the Norfolk City Police Department or Commonwealth Attorney's Office, Norfolk, on behalf of Nichols for information he furnished regarding Henry. I did not intercede on Nichols' behalf to have him released from the Norfolk City Jail. As I recall, Nichols was being released at this time because his jail time had been served. Again, I recall specifically telling Nichols not to question Billy Gale Henry regarding the bank robbery charge against him, however, if Henry was requesting Nichols' assistance and Henry was initiating the conversation about the bank robbery, Nichols was requested to report this information.

I never interviewed Joseph Sadler and never requested anyone at the Norfolk City Jail or Portsmouth City Jail to have Sadler and Henry placed in the same cell. I never requested anyone in the U. S. Marshal's Office, Norfolk, to have Henry placed in a specific jail or cell with Sadler.

/s/ Gerald T. Coughlin
GERALD T. COUGHLIN

Subscribed and sworn to before me this 13 day of September, 1977.

/s/ Andrea R. Coleman
Notary Public for
Norfolk, Virginia

My Commission Expires:
Mar. 8, 1981

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 294558 419

Supreme Court, U. S.
FILED
NOV 19 1979
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-121

UNITED STATES OF AMERICA,

Petitioner

—*v.*—

BILLY GALE HENRY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 25, 1979
CERTIORARI GRANTED OCTOBER 1, 1979

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-121

UNITED STATES OF AMERICA,
Petitioner

—*v.*—

BILLY GALE HENRY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

INDEX

	Page
Relevant Docket Entries	1
Transcript of Proceedings, December 27, 1972	9
Transcript of Proceedings, March 7, 1973	11
Testimony of Robert H. Woodcock (bank employee)	11
Testimony of Ruth Bridges (bank employee)	14
Testimony of Alvin Owens (bank employee)	16
Testimony of John Peterson (employee of nearby business)	18
Testimony of Edward Benjamin Nichols (inmate at Norfolk City Jail)	28
Testimony of Joseph Elbert Sadler (inmate at Norfolk City Jail)	31
Testimony of Steven D. Slayton (employee of manufacturer of radio receivers)	37
Testimony of Clarence E. Phillips (FBI Agent—fingerprint expert)	41
Testimony of Eldon Bryant (FBI Agent—expert in radio matters)	42

	Page
Testimony of Gaynor Holiday (owner of premises at 6420 Wailes Ave., Norfolk, Virginia)	44
Testimony of Barbara Lorraine Henson (neighbor of Wailes Ave. premises)	46
Testimony of Nicholas V. O'Hara (FBI Agent)	48
Jury Verdict	49
Judgment and Sentence	49
Petition for Writ of Habeas Corpus (§ 2255 Motion), August 28, 1975	51
Excerpts from Amendment of Complaint (§ 2255 Motion), June 27, 1977	71
Letter from Chief Judge Richard B. Kellam to Roger T. Williams, Assistant United States Attorney, August 30, 1977	82
Affidavit of FBI Special Agent Nicholas V. O'Hara, September 7, 1977	84
Order allowing certiorari	86

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

CR. 243-72-N

THE UNITED STATES

vs.

BILLY GALE HENRY

DOCKET ENTRIES *

DATE	PROCEEDINGS
1972	
Nov. 15	Indictment returned and filed at Alexandria, Va. and on mo. of U.S. ordered transferred to the Norfolk Div. for docketing and trial.
Nov. 28	COURT PROCEEDINGS (JAM)—U.S. appeared thru Mr. Hunter Sims, AUSA. Deft. present (in custody) without counsel. Court explained right to counsel. Counsel desired. Deft. sworn; affidavit exec. Court directed appt. of counsel. Deft. remanded to Marshal's custody. LATER: Mr. Sims, deft, and Mr. Ralph Rabinowitz, c.a. counsel, appeared. Copy of indict. prev. furnished to deft. Deft. waived formal arr. Deft. plead not guilty. Set for trial on 2/1/73 with jury at 10 a.m. Deft. remanded to Marshal's custody.
Nov. 27	CJA 20 appointment & voucher for counseling services (Ralph Rabinowitz) entered & filed. JAM, Judge. Copies dist.
Dec. 27	COURT PROCEEDINGS. Deft. present (in custody) with his c.a. counsel, Mr. Ralph Rabinowitz. Came on for hearing on motions. * * * RE MOTION FOR DISCOVERY AND INSPECTION—items 1 thru 5—not applicable (no wire tap) * * * items 24, 25 & 26—statements of accused will be furnished.

* Entries deemed irrelevant by the parties have been omitted.

DATE	PROCEEDINGS

1973

Jan. 11 Defendant's motion for a continuance, filed.

Jan. 11 Motion for continuance granted (see notation on motion by WEH). Case removed from docket for 2/1/73 * * * and, re-set on merits (jury) on 3/7/73.

Mar. 7 COURT PROCEEDINGS. Jury ret. with the following verdict: "We, the Jury, find the deft. guilty as charged and of assaulting or putting in jeopardy the life of Robert Woodcock in the commission of such offense as charged in the Indictment, Signed Robert A. Combs, Foreman." dated March 7, 1973. Deft. mo. to set aside Jury verdict, was denied by the Court. Deft. desired to be sent. today. Probation Report waived by deft. Comments of counsel heard. Comments of deft. heard. Nothing further offered in delay of Sentence. SENTENCE: It is the Judgment of the Court that deft. be committed to the custody of the Atty. Gen. or his duly auth. rep. to be confined for a term of 25 yrs., unless sooner released by oper. of law. Court advised deft. of his right of appeal within 10 days. Deft. stated he wished to appeal. Notice of appeal exec. and filed. Court directed transcript be prepared at Govt. expense.

Mar. 8 Judg. & Commit. order entered 3-7-73 and filed.

Mar. 7 Notice of Appeal exec. by deft. filed. (F. P.)

Mar. 8 Notice and copy of notice of appeal forwarded to deft.; deft's atty.; Charles Barnes, Court Reporter; and U.S. Atty.

Mar. 8 Conformed copies of notice of appeal and docket entries forwarded to Clerk, U.S. Court of Appeals.

1975

May 13 Letter from deft. treated as a motion for reduction in sentence filed. Motion denied by the Court. Copy of letter with denial. fwd. to deft.

DATE	PROCEEDINGS

1975

Aug. 28 Copy of Memo. Order re C/A 75-453-N placed in file.

Oct. 28 Case filed mailed to U.S. Court of Appeals with record on appeal C/A 75-453-N

1976

Dec. 16 Defendant's motion for new trial filed.

1977

Mar. 31 Advanced opinion received from Court of Appeals filed (D.C. affirmed in part and reversed in part and remanded for further proceedings.)

Apr. 25 Cert. copy of Judgment order affirming in part and reversing in part D.C. Case remanded with directions for further proceedings; copy of Opinion recd. and filed.

Oct. 11 Copy of Memorandum (C/A 75-453-N) that motion for new trial filed in criminal action and the habeas corpus proceedings are consolidated and are dealt with in this order (motion for new trial DENIED), received & filed.

1978

Dec. 27 Advanced copy of opinion received from the Court of Appeals and filed. (See C/A 75-453-N).

1979

Apr. 9 Cert. copy of Judgment order REVERSING 2255 Motion & REMANDING with instructions etc. received from the Court of Appeals. Copy of opinion received and filed.

Apr. 30 Defendant's motion for release before trial filed.

May 23 COURT PROCEEDINGS. Deft. not present. Matter came on for he on deft's motion to set bond. Court takes matter under advisement.

DATE	PROCEEDINGS
1979	
June 20	Def't motion to dismiss the charge filed.
June 26	ORDER denying deft's request to be released on bond pending outcome of Supreme Court decision entered and filed.
June 26	FBI report on deft. filed.
July 5	Notice of appeal from Order dated June 25, 1979 denying deft. bail pending outcome of the U.S. application for a Writ of Certiorari, filed. (F.P.)
Sept. 24	Advanced copy of opinion received from the Court of Appeals AFFIRMING D.C. filed.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

75-2142

UNITED STATES OF AMERICA

v.

BILLY GALE HENRY

DOCKET ENTRIES

DATE	FILINGS—PROCEEDINGS
10/29/75	Appeal docketed.
4/28/76	Appellant's "supplement to the record" filed.
9/27/76	Appellant's "Motion to Supplement the Record, Motion for New Trial, and/or Motion for an Evidentiary Hearing" filed.
11/19/76	Appellant's Motion for a New Trial and/or Hearing on Newly Discovered Evidence filed.
11/19/76	Appellant's motion for a New Trial—Rule 33, Newly Discovered Evidence filed.
3/29/77	Judgment of the district court affirmed in part, reversed in part, and case remanded for further proceedings. Judgment filed.
4/19/77	Certified copy of the judgment and printed copy of the opinion transmitted to the Clerk of the District Court at Norfolk, Va.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

77-2338 & 2255

UNITED STATES OF AMERICA

v.

BILLY GALE HENRY

DOCKET ENTRIES

DATE	FILINGS—PROCEEDINGS
10/28/77	Appeal docketed.
10/28/77	Amendment of the Complaint by Plaintiff, Record on Appeal in previous case No. 75-2142; all in one envelope, filed.
12/1/77	Appellant's motion for bond filed.
1/12/78	Appellant's memorandum in support of bail application filed; transmitted to panel.
3/20/78	Appellant's suggestion of counsel to be appointed and letter supporting request for bond filed.
3/23/78	ORDER denying motion for bond, filed.
3/28/78	ORDER appointing counsel (CJA Form 20), filed.
5/5/78	MOTION for expedited scheduling of argument and memorandum in support of motion, filed.
5/17/78	Answer to motion for expedited appeal, filed.
5/17/78	ORDER expediting case for argument at the July 1978 session, filed.
10/4/78	Cause argued before Judges Winter, Butzner and Russell, Circuit Judges, and submitted.
12/26/78	Opinion filed. Judge Butzner concurring. Judge Russell dissenting.

DATE	FILINGS—PROCEEDINGS
12/26/78	Judgment of the District Court reversed and remanded.
1/5/79	MOTION of appellee for extension of time to file petition for rehearing to February 15, 1979, filed.
1/8/79	ORDER extending time to file petition for rehearing to February 15, 1979, filed. ecr copies to Ritchie, Chang, Williams.
1/10/79	Opposition for extension of time to file petition for rehearing, filed.
1/26/79	MOTION for release pending government's efforts to obtain review filed.
2/6/79	MOTION to extend time to 2/8/79 to file response to motion for release pending review, filed. MOTION GRANTED.
2/7/78	Response in opposition to appellant's motion for release on bond filed.
2/16/79	SECOND MOTION for extension of time to file a petition for rehearing, filed.
2/26/79	ORDER denying the motion for release pending the government's motion to obtain review, filed.
2/26/79	Supplemental memorandum in support of application for bail pending resolution of government's efforts to review the court's decision, filed.
2/27/79	ORDER granting the government's second extension of time to file a petition for rehearing to 3/1/79, filed.
3/1/79	Petition for rehearing and suggestion for appropriateness for rehearing en banc, filed.
3/9/79	MOTION for leave to file answer to petition for rehearing, filed. MOTION GRANTED.
3/30/79	ORDER denying petition for rehearing, filed.

DATE	FILINGS—PROCEEDINGS

4/6/79 Certified copy of the judgment and printed copy of the opinion transmitted to the Clerk of the District Court at Norfolk, Va.

7/13/79 MOTION (C-81) of A for release pending review under Rule 23(c) FRAP, filed.

7/25/79 RESPONSE of appellee to motion for release pending review, filed.

8/2/79 ORDER denying the motion for release pending review, filed.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Criminal Action No. 243-72-N

UNITED STATES OF AMERICA

v.

BILLY GALE HENRY

Proceedings had in the above-entitled cause on the 27th day of December, 1972, at 2:16 p.m., in the United States District Court for the Eastern District of Virginia, Norfolk Division, at Norfolk, Virginia, before the Honorable Richard B. Kellam, United States District Judge.

[2] APPEARANCES:

For the Government:
Hunter W. Sims, Esquire,
Assistant United States Attorney,
409 Federal Building,
Norfolk, Virginia 23510.

For the Defendant:

Ralph Rabinowitz, Esquire,
1224 Maritime Tower,
Norfolk, Virginia 23514.

* * * *

[17] [MR. SIMS]:

Number 20: I think we've gone over that. They're not entitled to a list of the prosecution witnesses.

Number 21, I think, is 16(b) of the Federal Rules of Criminal Procedure. We will give them the test results, and the physical evidence may be viewed at the FBI Headquarters.

Number 22 calls for Jencks Act material. That will be furnished on the day of the trial.

Number 23 seems to be the Brady motion rephrased. We'll furnish the—

THE COURT: Covered by 13 as well.

MR. SIMS: Yes, sir.

THE COURT: All right.

MR. SIMS: We'll furnish statements of the accused, if any.

There are no statements of accomplices.

[18] We will not furnish investigative reports from the FBI or any other law enforcement agencies. I don't think that we are required to under Rule 16 or any other discovery process.

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DVISION

Criminal Action No. 243-72-N

UNITED STATES OF AMERICA

v.

BILLY GALE HENRY

Proceedings had and evidence taken in the above-entitled cause on the 7th day of March, 1973, at 10:30 a.m., in the United States District Court for the Eastern District of Virginia, Norfolk Division, at Norfolk, Virginia, before the Honorable Richard B. Kellam, United States District Judge, and a jury.

[2] APPEARANCES:

For the Government:

Hunter W. Sims, Esquire,
Assistant United States Attorney,
Eastern District of Virginia,
409 Federal Building,
Norfolk, Virginia 23510.

For the Defendant:

Ralph Rabinowitz, Esquire,
1224 Maritime Tower,
Norfolk, Virginia 23514.

* * * * *

[5] ROBERT H. WOODCOCK,

a witness called by and in behalf of the government, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Sims:

Q State your name, please, sir.
A Robert H. Woodcock.
Q How are you employed, Mr. Woodcock?
[6] A As the head teller of the Janaf Branch, United Virginia Bank/Seaboard National.
Q Were you so employed on the 28th day of August 1972?
A Yes, sir.
Q Are the deposits of that bank insured, sir?
A Yes, sir.
Q How are they insured?
A Federal Deposit Insurance Corporation.
Q I hand you now a document.
Would you explain that document, please?
A What was your question?
Q Could you explain that document to the jury, please?
A This is a certificate that the bank is covered by the Federal Deposit Insurance Act, carrying a serial number.
MR. SIMS: I'd offer this as Government's Exhibit Number 1, your Honor.
MR. RABINOWITZ: No objection, your Honor.

* * * * *

[10] [MR. SIMS]: Did anything unusual occur in the bank shortly after 9 o'clock on the morning of August 28th?
[MR. WOODCOCK] After we listed these bags—
There are certain ones the bank has a type of contract that the bank under supervision of two people open the bags and take out the contents and make the deposits for the customer. All of that type of bags was removed from the shelf and placed in the head teller's cage.
Shortly after 9 o'clock, when the bank was opened, two persons, disguised in green coverals, theatrical type masks and gloves, entered the bank. One of these persons vaulted over the counter of the head teller's cage, struck

me on the head with an object, then marched me out of that cage, out into the lobby, where I could be observed by the other person in the lobby. This person then went back to the cage and proceeded to stuff these night-deposit bags into some Army type duffel bags, after which they were dragged out of the bank by these two people, and they departed.
Q Okay. Let's call the two robbers Number 1 [11] and Number 2.
Were you able to determine—
Number 1 is the fellow that jumped over the teller's cage.
Were you able to determine his general characteristics at all?
A The only difference in characteristics that I could determine was the one who came into the cage appeared to be an inch or two inches taller than the one standing near the door.
Q Did they carry any weapons or did you observe?
A The person who came into the cage had a pistol in his right hand and an object in his left hand that I couldn't discern, and the person in the lobby had a gun, holding control over the employees in the lobby.
Q When you were hit on the head, did that cause you to bleed at all?
A Yes.
Q Did you seek any help?
A The ambulance service came, took me to the Norfolk General Hospital, where I understand 10 stitches were taken in my head.
Q Now, Mr. Woodcock, after the bank robbery, did you make a determination of the bank bags that were [12] taken—the night-deposit bags?
A Yes, sir.
All bank bags remaining were checked against this set of records, thereby determining those that were missing.
Q And, so, you are able to determine which ones—
A Yes, sir.
Q —were taken?
A Yes, sir.

Q Okay.

MR. SIMS: At this time I would move for the introduction of the list prepared by Mr. Woodcock.

MR. RABINOWITZ: No objection, if your Honor please.

THE COURT: All right, sir.

MR. SIMS: Government's Exhibit Number 2.

THE COURT: It's admitted.

* * * * *

[26] RUTH BRIDGES,

a witness called by and in behalf of the government, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SIMS:

Q State your name, please.

A Ruth Bridges.

Q How are you employed, Mrs. Bridges?

A I'm a credit clerk and vault attendant at the Janaf Branch of United Virginia.

Q Were you so employed on the 28th day of August 1972?

A Yes; I was.

Q What city is the Janaf Branch of the United Virginia Bank in?

A Norfolk.

Q Would you relate anything unusual that occurred in the morning of the 28th of August?

A Yes.

We were held up.

Q Would you tell the jury at this time the circumstances surrounding that robbery?

A Well, I was sitting in the back room at my desk, and I heard what I think were shots and screaming. So, I got up from my desk, and as I went to the front of the [27] bank, the front part of the bank, where the teller's cage was, a man came with Mr. Woody and another girl, screaming, and he was full of blood.

Q Did you make any observation as to the people robbing the bank?

A Well, there was one man at the door, to the right, covering the customers, and this man, other man, came from Mr. Woody and the lady toward me.

Q Was he armed—

A I think—

Q —the man standing in the lobby?

A Yes; the man standing in the lobby had a gun on the customers, and the other man—I'm not sure if he had a gun in his hand when he came toward me or not.

Q Now, this other man that came toward you—what did he do?

A Well, the other girl was screaming so much and started running, and he started chasing her, and she came back and either passed out or fell at my feet, and then he told me to get out in the lobby and sit at the desk, and I did.

Q And during this activity the other robber stood in the—

A At the door.

Q —lobby?

[28] A (The witness nodded affirmatively.)

Q Okay.

Could you make any determination as to the height of these two individuals?

Was one taller than the other?

A Yes. I believe the one that had Mr. Woody was taller than the other man.

Q Than the man that stood in the lobby?

A The door.

Q Okay.

Were you able to describe what these men were wearing?

A Yes.

Coveralls and masks, hideous masks, and gloves, and sneakers. One man had sneakers.

* * * * *

[35] ALVIN OWENS,

a witness called by and in behalf of the government, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SIMS:

Q State your name, please, sir.
A Alvin Owens.
Q How are you employed, Mr. Owens?
A I am with the United Virginia Bank/Seaboard National.
Q On the 28th of August 1972 were you employed with that bank?
A Yes, sir; I was.
Q Did any—
A At the Janaf Shopping Center Branch.
Q Did any unusual event occur on the morning of the 28th of August?
A Yes, sir.

Very shortly after closing two men entered the bank, and—

Q Pardon me. You said "closing".
A Opening.

I'm sorry.

Q What time was this?
A Somewhere between nine and 9:05.

[36] Q Okay.

A They came in, and they were in a frenzy, very excited acting, and they were wearing masks and coveralls and such and carrying guns, and they ran across the lobby, hollering, one of them stopping in the middle of the lobby, the other proceeding to the head teller's cage, which is at the other end of the lobby, at which time he put his hands on the cage and pounded on it and jumped over it and struck the head teller on the head, evidently with a gun,—I'm not sure what he struck him with, but I think it was a gun—at approximately which time I heard a shot. He proceeded to move everyone away from the area and get them out into the lobby and scrape

up all the night-depository bags available, and then he came out the front with a bag filled with the night-deposit bags, dragging it out the door, and then they left the bank.

Q How long did this robbery last?
A It couldn't have been over five or 10 minutes.
Q Could you make a determination as to height, weight and race of the two men that entered the bank?
A Right.

They were both white men. I could tell this because the masks they were wearing were slit down the side of the neck and I could see the color of their necks.

[37] The one that stopped in the middle of the lobby was a shorter, stocky guy. I'd say something under six feet; just a little under six.

The one that bounded over the head teller's cage was about six or a little better.

Q Were these men armed?
A Yes, sir.

The one in the middle of the lobby was pointing a pistol at me. It looked to be a .38 special, just from the diameter of the hole in the barrel, and the one that went over the head teller's cage was carrying what sounded to be a .32 when it fired.

Q Did you observe whether the man in the lobby was wearing any particular shoes?
A Yes.

The man in the middle of the lobby was wearing blue sneakers. I remember them vividly, because I had to do something to keep my mind occupied to keep from panicking under the stress, and so, I observed him very carefully since he was the closest one to me. He was wearing blue sneakers, a green OD-colored set of coveralls and a flesh-colored Halloween type mask which covered his complete head.

Q How about the other fellow, the one that bounded over the teller's cage?

[38] A I could tell he was wearing a rubber mask, Halloween mask, of the same type, with hair on it and a moustache on it, and green coveralls of the same type, but I did not concentrate on his feet or any other part of him.

* * * * *

[47] JOHN PETERSON,

a witness called by and in behalf of the government, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Sims:

Q State your name, please, sir.
A My name is John Peterson.
Q How are you employed, Mr. Peterson?
A As a commercial account executive for Allstate Insurance Company.
Q Were you so employed on the morning of the 28th of August 1972?
A I was.
Q Where is your office?
A Janaf Shopping Center.
Q How far away is your office from the Janaf Branch of the United Virginia Bank?
A Maybe 200 feet.
Q On that morning did you have anything strange occur in the vicinity of your company?
A Yes; we did.
On that—
Should I relate—
Q Yes, sir.
A —what it was?
[48] Q Please.
A On that particular morning we had a very excited individual run in the back door of our office, yelling: "The bank's being robbed. The bank's being robbed. Somebody please get the license number of the getaway car."
At that point I ran out the front door of the office, past High's Ice Cream, almost to the bank, and got the license number of the car.
Q What was that number?
A The number was BBL-373.

Q Was that a Virginia license number?
A Yes; it was. It was the black background with the white numerals.
Q Did you tell anyone about this licence plate number?
A Yes; I did.
I immediately headed back as an individual came out of the bank, and an individual in the car, observing me, started honking the horn so as to indicate he had a problem, but I related that number immediately to one of the people in the office, who then immediately called the police.
Q Did you get a description of the car?
A Yes.
[49] Q What is that?
A It was a tan Falcon.
Q Could you describe the man that sat in the car or the individual?
A I described the man in the car as a white male—at the time with long blond hair and a sun visor.
Q Now, when you observed someone coming out of the bank, how many people did you observe?
A I noted the first man came out of the bank. I was about 60 feet from him, and I made a hasty retreat back to the office with the license number information, so on and so forth. At that point I turned around to give that information to the person who was making the call to the police. As I turned back around, I observed a third man get into the car.
Q Were you able to identify any one of the men coming out of the bank?
A Yes.
I identified the first man who came out of the bank.
Q Do you recall his name?
A Mr. Moore.
Q Okay.
How about the second man that came out of the bank?
[50] A The second man that came out of the bank I saw as he entered the car. As to a description, other than height and weight, no.

Q Was he dressed in a particular way, if you recall?
A Yes.
They were in green fatigues. Both men were in green fatigues.
Q Could you describe the height and weight of the two people that you observed?
A The man I identified as Mr. Moore I described as five ten, one eighty, if I'm not correct. The other individual might have been slightly taller. I don't recall whether or not I could give a weight on it. The individual was getting into the car at the time.
Q Did you notice where these individuals got into the car?
A The third man got in the back seat.
Q And how about Mr. Moore?
A Mr. Moore got in the front seat alongside the driver.
MR. SIMS: That's all the questions I have, Judge.
MR. RABINOWITZ: Mr. Peterson, I'm going to put some questions to you and, unlike [51] a usual cross-examination, I'm just going to ask you what you saw, because your testimony is very important to my client, and I ask the jury to listen to your testimony very, very carefully.

CROSS-EXAMINATION

By Mr. Rabinowitz:

Q Now, sir, were you able to determine how many men were in the getaway car?
A Oh, absolutely.
Q How many were there, sir?
A Three.
Q All right.
Now, were you able to tell who the driver of the getaway car was in terms of a description?
How did you describe the driver—
A I saw—
Q —of the getaway car?
A —the driver initially as I came up to the car. I was no more than 60 feet away. I described the driver

at the time and will now as having long blond hair, a green sun visor and a white T-shirt on.
Q Now, the driver—the third man—was that third man that you described as having long blond hair, having a sun visor on—
[52] And what age did you state that man was, approximately?
A I stated he was about 30, I believe; somewhere in the area.
Q Now, was this the man?
A No. I don't believe this man drove the car.
Q All right.
Now, you have testified before in this bank-robbery situation, have you not?
A Yes. I've been in a previous trial.
Q That was the trial where Mr. Luck and Mr. Moore were on trial; isn't that true?
A Yes, sir.
Q All right.
Now, you have identified one of those men as being inside the bank and coming out, have you not?
A That's correct.
Q Which one was that?
A Mr. Moore.
Q Now, there was another man on trial then, was there not?
A Yes; there was.
Q What was his name?
A Mr. Luck.
Q Mr. Luck was on trial then, too.
[53] Now, Mr. Luck and Mr. Moore were on trial, and this was not the third man driving the car; is that correct?
A That man does not look like the man I saw driving the car.
Q Now, Mr. Luck and Mr. Moore, who were on trial before—did you identify either of them—
A Mr. Moore.
Q —did you identify either Mr. Moore or Mr. Luck—as being the driver of the getaway car?
A No; I did not.

Q Neither of them were a driver of the getaway car?
A I can't make that statement.
Q In other words, neither Mr. Luck or Mr. Moore drove the getaway car—
A I can't—
Q —that was—
A My statement would be to the effect that I saw the driver of the car and, in my opinion, I could not identify the driver, though I gave a description of the man driving the car.

I would not make the statement that neither man drove the car. I know that Mr. Moore didn't drive the car. Whether or not Mr. Luck drove the car, I couldn't so [54] testify.

Q Are you saying now that Mr. Luck, who you testified about before, fit the description—

Now, you saw Mr. Luck before in the former trial, didn't you?

He was sitting right in the courtroom?
A Oh, I had to see him.
Q All right.
A I couldn't miss him.
Q Now, what did—

What age was Mr. Luck, approximately?
A Forty, 45.
Q And how tall was Mr. Luck?
A Mr. Luck never stood in my presence. That would be very difficult for me to say.
Q Well, now, Mr. Luck, you say, was 40 or about?
A That's—
Q And the man who drove the getaway car you described as a young man, with blond hair, of about 27; correct?
A That's correct.
Q So, was Mr. Luck—as best you can observe, was Mr. Luck—the man who drove the getaway car or not?
A Would you rephrase that so I can hear that?
[55] Are you asking me to say Mr. Luck was or wasn't the man driving the getaway car?

Q I was not asking you to say anything, sir. I am asking you what you observed. I am asking you—

You saw Mr. Luck in the trial before; correct?
A If I could have identified Mr. Luck as driving the car, I would have done so at the other trial.
Q And did you identify Mr. Luck as the man who was driving the car or not?
A I did not.
Q Was he the man driving the getaway car?
A If I could have done so, I would have done so at the time.
Q I—
A I wouldn't have withheld any testimony.
Q I—

I am not saying that, sir. I am just saying: You saw the driver of the getaway car for—

THE COURT: Use the podium, Mr. Rabinowitz.

MR. RABINOWITZ: Excuse me, your Honor. I get—

THE COURT: All right, sir.

MR. RABINOWITZ: This is important, [56] and I get—

I get a little bit riled up.

This is important.

THE WITNESS: It is to me, too,—

MR. RABINOWITZ: Yes, sir.

THE WITNESS: —or I wouldn't be here.

MR. RABINOWITZ: I'm not finding fault with you. I want you to understand me. I know you are trying to tell us the best you know how, but I've got to get to what you know here.

By Mr. Rabinowitz:

Q You had a clear-cut view of the driver of the getaway car?
A That's correct.
Q And you have described the driver of the getaway car as being a man of about 27; correct?
A In that general area.
Q With long blond hair?
A That's correct.

Q And you have testified previously that Mr. Luck was not the driver of that getaway car?

A No. I didn't testify that he was or wasn't. I said I couldn't identify him.

Q Did you sit in the courtroom and look at [57] Mr. Luck?

A Yes; I did.

Q How long did you get a chance to look at him?

A Most of the time I was looking directly at the attorney who was asking the questions, and I didn't—

Just as now, I don't—

You know, I'm trying to direct my attention to you.

I saw the man, and if I had been able to identify him I would have said so at the time.

Q Well, in the former trial you did not identify Mr. Luck as being the driver of the getaway car?

A That is correct.

Q In fact, Mr. Luck you described as being about 40 years of age; you describe now as being—

A Just now.

Q Yes.

A Not in the other trial.

Q Yes.

A That's correct.

Q And the driver of the getaway car you described as being a much younger man with long blond hair?

A That was the description I gave.

Q Now, you did identify Mr. Moore as being one of the men who was in the bank?

[58] A That's correct.

Q Well, then, Mr. Luck and Mr. Moore had to have been the men who were in the bank if they weren't the man in the getaway car; isn't that true?

A Now you are asking—

THE COURT: That is a conclusion.

THE WITNESS: —me to—

THE COURT: Gentlemen,—

THE WITNESS: Yeah.

THE COURT: —that is not for him to say. That is for the jury to say.

That's an argument and a conclusion which one may draw if he desires to.

MR. RABINOWITZ: Thank you.

REDIRECT EXAMINATION

By Mr. Sims:

Q Mr. Peterson, for how long a period of time did you observe the driver of the car?

A Thirty seconds, 45 seconds, and then again maybe two, three minutes.

Q Okay.

During this time you were out behind the bank did you experience any apprehension of fear?

A Did I?

Q Yes.

[59] A Very definitely.

I sort of asked myself the question: "What in the world am I doing out here? I don't see anybody else volunteering."

But, yes, as Mr. Moore came out of the bank, I at that point decided to, whether it was fear or whether it was preservation or what, get back to some protection.

MR. SIMS: No further questions, your Honor.

THE COURT: Gentlemen, may he be excused?

MR. SIMS: He may, Judge.

MR. RABINOWITZ: Just one question.

THE COURT: All right, sir.

RECROSS-EXAMINATION

By Mr. Rabinowitz:

Q The man who drove the getaway car—did he have anything over his face?

A Absolutely nothing,—

Q You—

A —other than the green visor, which was on the hair, and I say "the hair" because I don't know whether it was his hair or somebody else's.

MR. RABINOWITZ: Move to strike as—
THE COURT: I think that's—
[60] MR. RABINOWITZ: Well, I got no point.

By Mr. Rabinowitz:

Q Did you get a chance to look carefully at the driver of the getaway car?
A The driver and I met eye to eye for a point of time.
There was—
Q And you have described him as a white male of about 27 with long blond hair?
A That is correct, with a visor and a T-shirt.
Q And you were—
You would not say that either Mr. Luck or Mr. Moore was that man?
MR. SIMS: Judge,—
THE WITNESS: I wouldn't make that statement.
MR. SIMS: —this question has been asked so many times by—
MR. RABINOWITZ: All right.
I'm just about through, Judge.
This is very important.
THE WITNESS: I cannot make that statement.

By Mr. Rabinowitz:

Q But you could make a statement that one of [61] the men that came out of the bank was who?
A Was Mr. Moore.
Q And did he have a mask on?
A Mr. Moore did not have a mask. He had a stocking on his head that was, as most women's stockings—leaves enough room to be seen through. You can judge either the face or the leg, depending on whether it's a leg or a face,—
Q But you would—
A —and his face stuck with me very vividly.
Q And, even with a stocking mask on his face, at the former trial you could identify—eyewitness identify—Mr. Moore as being one of the men in the bank?
A The instant I saw Mr. Moore, with his forehead, so on and so forth, it was impossible for me not to.

Q But you could not say that Mr. Luck was the driver of the getaway car?
THE COURT: Gentlemen, he's answered that—
MR. RABINOWITZ: All right.
THE COURT: —several times.
MR. RABINOWITZ: I just want to make it clear, and I won't go on.
THE COURT: All right, sir.

[62] FURTHER REDIRECT EXAMINATION

By Mr. Sims:

Q Mr. Peterson, this yellow hair of the driver of the getaway car—did you make any determination whether that was a wig or whether it was real hair?
A The gentleman driving the car had to turn around to face me and through the back window, with the sun against it, I would—
It's impossible for me to spot a wig. I couldn't tell who in here was wearing a wig, for example.
MR. SIMS: No further question, Judge.
THE COURT: Thank you very much.

FURTHER RECROSS-EXAMINATION

By Mr. Rabinowitz:

Q But you did—
THE COURT: You may be excused.
MR. RABINOWITZ: If your Honor please—
THE COURT: Yes, sir.

By Mr. Rabinowitz:

Q You have up to now always described it as long blond hair, haven't you?
A Oh, I wouldn't change my testimony.
Q Long blond hair?
[63] A That's correct.
MR. RABINOWITZ: All right.

* * * * *

[134] EDWARD BENJAMIN NICHOLS,

a witness called by and in behalf of the government, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Sims:

Q State your name, please, sir.
A Edward Benjamin Nichols.
Q Mr. Nichols, do you know Billy Gale Henry?
A Yes; I do.
Q Do you see him here in the courtroom today?
A Yes, sir.
Q Where is he located?
A Sitting right there.
Q Okay.

MR. SIMS: Let the record reflect the witness has identified Mr. Henry.

THE COURT: The record will so show.

By Mr. Sims:

Q Where did you meet Mr. Henry?
A At the Norfolk City Jail.
Q Did you have an opportunity to have some conversations with Mr. Henry while he was in the jail?
A Yes, sir.
Q Did there come a time when you related the product of this conversation to an FBI agent?

[135] A Yes, sir.
Q Did you relate that to the FBI agent before or after Mr. Henry gave you information?
A After.
Q Did the FBI—
What is the FBI agent's name?
A Jerry Coughlin.
Q Did he have you ask specific questions of Mr. Henry?
A No, sir.

Q Did he tell you anything about the bank robbery at the Janaf Branch of the United Virginia Bank on the 28th of August 1972?
A No, sir.
Q Did Mr. Henry tell you anything about that bank robbery?
A Yes, sir.
Q Would you relate to the jury what he told you?
A That he had been in the bank; that he had been in the bank that he was accused of; that he had been in the bank several times; that he had exchanged money several times, and he—and one time, one particular time, that he tried—

THE REPORTER: Say it again, please.

[136] THE WITNESS: One particular time he tried and—

THE COURT: One time he—what?

The WITNESS: The bank had closed, and he tried, and he was refused admission to the bank because it was closed, and he turned and walked away.

THE COURT: Speak up just a little louder, too, if you will, please, so all the jury can hear you.

By Mr. Sims:

Q Did he tell you—

MR. RABINOWITZ: If your Honor please—
I'll wait for cross-examination.

THE COURT: All right.

MR. RABINOWITZ: I think up to now—

By Mr. Sims:

Q Did he—

MR. RABINOWITZ: I'll let it go on.

By Mr. Sims:

Q Did he give you any reason for going in the Janaf Bank?
A I believe he said he wanted to see who opened the vault.

[137] Q Okay.
Did he describe to you how a bank robbery occurred?

MR. RABINOWITZ: If your Honor please, he is leading his witness now.

MR. SIMS: Okay. I'll rephrase the question.

MR. RABINOWITZ: This is his witness, if your Honor please,—

THE COURT: Well,—

MR. RABINOWITZ: —and from jail—

THE COURT: —I suppose—

MR. RABINOWITZ: —he is asking him what he said, and now he's leading him into specific—

He's trying to get something from him. I don't know what it is. I've never—

The witness is a surprise to me.

THE COURT: All right. Suppose you try to rephrase it, although I don't believe that's leading, but he can rephrase the question.

Did he tell you anything about any bank robbery there?

THE WITNESS: Yes, sir.

[138] THE COURT: All right.

What did he tell you?

By Mr. Sims:

Q What did he tell you, sir?

A He said that people were—several people went into the bank, about showing guns, and a bank teller was hit.

Q Did he say anything about being removed from the bank?

A No. No; he didn't.

Q Did he mention anything to you about a rent receipt found—

A Yes, sir; he did.

Q Would you relate that, please?

A He said—he told me—that the only thing to connect him to the bank was a rent receipt of a house he had rented.

Q Have you previously been convicted of a felony?

A Yes.

MR. SIMS: That's all the questions I have.

CROSS-EXAMINATION

By Mr. Rabinowitz:

Q You are a convicted felon?

[139] A Yes.

Q And you were in jail with Mr. Henry?

A Yes.

Q And now you're free?

A Yes.

Q Now, what Mr. Henry related to you was that he was telling you about a rent receipt and telling you about the charges against him, was he not?

A He was.

Q Isn't that it?

A He mentioned the rent receipt and he said he was in the jail for bank robbery.

Q He was telling you basically about what charges were against him, wasn't he?

A He mentioned it.

Q And that's what it was all about?

A Yes, sir.

MR. RABINOWITZ: That's all I have.

THE COURT: All right, sir.

Gentlemen, may he be excused?

MR. SIMS: No further questions.

THE COURT: Fine. Thank you very much. You are excused.

MR. SIMS: At this time, Judge, I would like to call Joseph D. Sadler.

[140] JOSEPH DELBERT SADLER,

a witness called by and in behalf of the government, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Sims:

Q State your name, please.

A Joseph Delbert Sadler.

Q Do you know Billy Gale Henry?
A Yes, sir.
Q Do you see him here today?
A Yes, sir.
Q Where is he?
A Right there.
MR. SIMS: Let the record reflect the witness has identified Billy Gale Henry.

By Mr. Sims:

Q Where did you meet him?
A Norfolk City Jail.
Q Did he relate any information to you?
A Yes, sir.
Q Did you subsequently give that information to an FBI agent?
A Yes, sir.
Q Who was the agent?
A Agent O'Hara.
[141] Q Did you have any conversations with Mr. O'Hara before Mr. Henry told you anything?
A No, sir.
Q Did Mr. O'Hara ask you to ask Henry any specific questions about this information?
A No, sir.
Q Did Mr. O'Hara arrange for you to be placed near Mr. Henry?
A No, sir.
Q Okay.
Did Mr. Henry give you any information concerning a bank robbery?
A Yes, sir.
Q What was that?
A He give me some information concerning a bank robbery in Virginia Beach approximately around six months ago.
Q In what month?
A I don't remember the month, but around six months ago.
Q Okay.
That would be—

MR. RABINOWITZ: If your Honor please, we can tell what six months is.
MR. SIMS: Okay.
[142] THE COURT: All right, sir.

By Mr. Sims:

Q Did he name the bank?
A No, sir; he didn't.
Q What did he tell you about the bank robbery?
A Well, Mr. Henry had—
I was in the cell block. The marshals had brought me to the cell block, which I was in federal custody before then, and I went to 7-A and was in the cell by myself, and after Mr. Henry learned that I had just come from the federal institution he moved down to the cell block with me, and then he started talking to me about various things that had happened, feeling what type of guy I was, and he made reference that him and a fellow by the name of Lucky or Luck or something of that sort and another man, which name he didn't call, went to a bank, and a woman driver in a car. Him and another man went inside the bank, and another man stood outside the door, and the woman was in the car—in the getaway. As he went in, he made—I believe he said that he had to hit one of the officials in the bank and took some money.
Q "He" meaning Henry?
A Yes, sir.
And then later on he asked me what was I charged with, and I told him and that I expected to get out [143] on probation, and he said that he wore a mask—him and the other fellows.
Q Okay.
Have you been convicted of a felony, sir?
A Yes, sir.
MR. SIMS: No further questions.

CROSS-EXAMINATION

By Mr. Rabinowitz:

Q Mr. Sadler, you have been charged and convicted of a felony?
A Yes, sir.

Q And now you have been let go?
A I beg your pardon, sir.
Q And now you have been let loose on the streets?
A No, sir.
Q Are you still in custody?
A Yes, sir.
Q Have you been promised any help by your testimony here today?
A No, sir.
Q How did you contact the FBI with this testimony?
A How did I contact the FBI?
I called the FBI agents.
[144] Q You did this—
A Yes, sir.
Q —as your public-spirited duty?
A In relation to my case.
It was through the advice of my attorney.
Q It was through the advice of your attorney?
A Yes, sir.
Q Who is your attorney?
A Mr. Abraham.
Q Now, you tell us that Mr. Henry told you four people were involved in a bank robbery?
A He said four; yes, sir.
Q And he said a woman was involved?
A Yes, sir.
Q Did he say what color the hair of the woman was?
A No, sir.
Q When did this supposed conversation with Mr. Henry occur?
A In November and the last part—the first part of December.
Q Well, which was it?
A I said last—
I was with—placed with Mr. Henry from the 24th of November 1972 until the day he left before Christmas.
[145] It was about a week before Christmas.
Q And he talked about this incident all that time?
A On several occasions.
Q What exactly again did he tell you about this incident?

A Well, after he gained my confidence and he found out I had been in federal custody myself and done time, he figured he could trust me and, with the hopes that I was getting out on probation, the probability that I might be able to help him.
Q Now, how in the world were you, a convicted felon, going to help him?
A Well, there's other circumstances.
Q Like what?
A Well, he was under the impression, and which I was under the impression, that I would get out on probation,—
Q You didn't—
A —and I was to contact—
Q What were you supposed to do for him when you got out on probation?
A I was supposed to contact a man by the name of Garland Holloway.
Q Who is he?
[146] A A friend of his, who he told me that was the only one that could give any evidence against him that he had robbed this bank.
Q Where was this Holloway supposed to be?
A In Atlanta, Georgia.
Q And were you supposed to go see Holloway?
A I was supposed to go see him and talk with him.
Q And what was Holloway supposed to have had to do with this robbery?
A I think he was staying with Mr. Holloway at the time.
Q He was staying with Mr. Holloway at the time of the robbery?
A Yes, sir.
Q In Atlanta, Georgia?
A Not in Atlanta, Georgia. Mr. Holloway was here in Norfolk, Virginia, in Ocean View.
Q Well, has Mr. Holloway been apprehended?
A I don't know, sir.
Q Well, did you intend to do this?
A I beg your pardon, sir.

Q Did you promise Mr. Henry that you were going to contact some Garland Holloway in Atlanta, Georgia?

A No, sir.

[147] Q You never promised him anything?

A No, sir.

Q Well, I thought you told us that he's telling you all this because you promised him some help when you got out on probation.

A He would assume that I would help him. I told him I would give it some thought. I did not promise him anything.

Q You told him you'd give it thought?

A Yes, sir.

Q You never promised him anything?

A No definite promise was made.

Q Did you take down the name "Holloway"?

A No, sir.

He supplied the name to me of Garland Holloway through the mail. From Portsmouth Jail, he wrote to me to Norfolk Jail.

Q I thought this happened when you were with him.

A He supplied only one name to me. He supplied—The one name in Norfolk Jail was Lucky.

He sent me a letter from Portsmouth Jail to Norfolk Jail, asking me when I got out on probation to come over, that he wanted me to go and see Mr. Holloway.

[148] Q And it was only after this Mr. Holloway was mentioned that he told you anything, wasn't it?

A No. He told me this before. He said he would let me know the name of the person that he wanted me to contact just as soon as I got out.

Q And you intended to do this?

A I hadn't made any promises at all.

Q Mr. Sadler, have you been made any promises at all?

A Have I been made any promise by whom?

Q By anybody.

A No one.

Q Never in your life?

A No, sir.

Q And you're still in custody?

A I'm still in custody.

Q Where are you residing now?

A In Norfolk City Jail.

Q How long have you been in the Norfolk City Jail?

A Since November the 24th.

Q When is your trial?

A I've completed my trial.

Q Is that the first time you have been in Norfolk City Jail?

[149] A I was in Norfolk City Jail November the 24th; yes, sir.

Q I said: Is this the first occasion upon which you have been residing in the Norfolk City Jail?

MR. SIMS: Your Honor, I'll object to that question. I don't think it's relevant.

The COURT: Well, I don't know. It may—

I'll permit him to ask it.

MR. RABINOWITZ: Thank you.

THE WITNESS: In 1961.

MR. RABINOWITZ: Sir?

THE WITNESS: Nineteen sixty-one.

By Mr. Rabinowitz:

Q Nineteen sixty-one?

A Yes, sir.

Q How long did you reside that time in the Norfolk City Jail?

A Approximately 30 days.

Q Then where were you sent?

Where were you sent?

A Lewisburg Federal Prison.

MR. RABINOWITZ: All right. That's all I have of this witness.

THE COURT: All right.

* * * * *

[154] STEVEN D. SLAYTON,

a witness called by and in behalf of the government, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Sims:

Q State your name and occupation, please, sir.
A Steven D. Slayton, and I'm Controller and Office Manager for Electra Company.
Q Where is the Electra Company?
A Cumberland, Indiana.
Q What does your company do?
A We manufacture and market scanners, radio receivers. Bearcat is the trade name.
Q I show you what's been marked as Government's Exhibit Number 10; ask you if you can identify this item, please, sir.
A Yes.
That's one of our—
It also has a mobile hookup to it also.
Q Is that the item that your company—
A Yes.
Q —markets?
A Yes; that's it.
Q How many channels on this thing?
A Eight.
[155] Q And would you explain just generally to the jury how one of these things operates?
A Well, depending on what area you live in, you buy the frequencies that go with this. It'll have a continuous scan, and when it hits one of these frequencies that have a transmission on it'll lock in on it, and as soon as they go off it goes back scanning. So, it's always looking for transmission.
Q Now, how many frequencies is this thing capable of scanning—
A Just eight.
Q —at one time?
A (No response.)
Q Eight?
A (The witness nodded affirmatively.)
Q Now, what is the situation with the crystals?

Each crystal is assigned a frequency; is that correct?
A True. Yeah.
Q And if I wanted to pick up any given broadcast in a given area what would I have to do?
A Well, if you could get the information from that area on what frequencies they were, you could order the crystals either through us or through a distributor, or if you wanted to call us you could probably call us and we would [156] give you what you were looking for in that area if you—it's depending on what you wanted.
Q I show you what's been marked for identification purposes as Government's Exhibit Number 24, and take it out of that plastic case and examine it and see if you can identify it, sir.
A Well, identifying marks are "Received July 5th, 1972, Electra Corporation". It also has my stamp down here where it mentions a money order for $55 to cover the—what we call purchase order, and it's for 11 crystals.
Q What is it?
What sort of form is it in?
A Well, it's
Q Would you just read it, please?
A Okay.
It says:
"Please send me the following crystals for a Electra Bearcat"—in quotations—"scanning receiver."
Then it's got "VHF", and under that it has six crystals, and it has—it goes down—"UHF", and under that it has five crystals, and it's got "1" marked across from each one, five dollars on the other side, and total of $55.
It has:

[157] "Mail To:

"R. A. Norris, Apartment Number 2
"Rivera Garden Apartments
"3000 BuFord Highway, Northeast
"Atlanta, Georgia."
Q All right.
Now, do you maintain records on—
Was that order filled?
A Yes; it was.

Q Do you maintain records on what police facilities are using what frequencies?

A Yes.

We have a microfilm that we get once a month, indicating any new stations and also old frequencies rather —instead of stations.

Q Did you have an opportunity to compare the frequencies requested in that letter with assigned frequencies in the southeastern section of the United States?

A Yes.

We—

Q What was the result of that comparison, sir?

A Well, most of the—

Well, I would say all the crystals are—indicate Atlanta, Georgia area, and because these are common [158] type crystals they also have some relation to, say, like Norfolk area or Virginia Beach. Some of them will correspond to Virginia Beach.

Q Well, when you say "Virginia Beach", is there any particular agency in Virginia Beach?

A Well, it would be—

I don't know, looking at these, what it would be. It would be probably Police Department or mobile relay or State Police Control Center.

Q Now, was there anything unusual that caught your attention about the number of frequencies ordered?

A Well, at the time—

By this being an eight-channel scanner, there's 11 crystals, which is not really that unusual. Some people have two of these items. Some people just like to—if they travel or something like this, they make take the crystals they know that would be in that area, if they want to particularly listen to it.

Q Was the frequency 156.21 requested?

A Yes; it was.

Q Okay.

What did you do with this letter subsequently?

A Well, as soon as the order was filled it was attached to the information we keep.

[159] An FBI agent came in to find some information about—

A phone call was placed to our company from Atlanta, Georgia.

Q Did you give him that letter at the time?

A Well, at the time we were looking at it for maybe a relation—relationship. In other words, we thought maybe there might be somebody working there as friends or relatives, and after they left then we looked through our files, and we had, oh, I think, about five or six names, one of 'em being R. A. Norris, and, so, I called him back, and he requested the information. So, I sent it to him.

Q You sent that letter—

A Yes.

Q —to the FBI?

A (The witness nodded affirmatively.)

MR. SIMS: Thank you.

* * * *

[167] CLARENCE E. PHILLIPS

a witness called by and in behalf of the government, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Sims:

Q State your name, please, sir.

A Clarence E. Phillips.

Q How are you employed, Mr. Phillips?

A I'm employed with the Federal Bureau of Investigation as a fingerprint examiner.

Q Where are your official headquarters?

A My official headquarters are in Washington, D.C.

Q And what is your official title, sir?

A Fingerprint examiner.

* * * *

[169] Q At this time I show you what's been marked as Government's Exhibits 14 and 15, which are a rent receipt and a lease agreement that were found on the back seat of a getaway car, and ask you if you have ever seen this evidence before, sir.

A Yes; I have.

Q Where did you see it?
A In my office in Washington, D.C.
Q Did you have an opportunity to examine it?
A I did.
Q What was the result of your examination?
A I developed two latent palm prints on this copy of the lease.
Q I now hand you Government's Exhibit Number 21, the known fingerprints of Billy Gale Henry; ask you if you have ever seen those.
A Yes.
Q Where have you seen those?
A Also in my office in Washington, D.C.
[170] Q Did you have an opportunity to compare the latent prints developed on the lease with those inked prints of Billy Gale Henry?
A Yes.
Q What was the result of your comparison, sir?
A The two latent palm prints developed on the lease were made by the same palm as made the right palm print appearing on this card, which has been designated Government's Exhibit Number 21.
Q Therefore, your testimony is that Billy Gale Henry's palm print is on that rent receipt?
A That is correct.

* * * *

[177] ELDON BRYANT,

a witness called by and in behalf of the government, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Sims:

Q State your name and occupation, please, sir.
A Eldon Bryant, special agent with the Federal Bureau of Investigation.
Q How long have you been a special agent?
A Since November 1970.
Q Where are you currently assigned?

A I am currently assigned to the FBI Laboratory as an examiner from Washington, D.C.
Q What is the nature of your work, sir?
A I design, engineer and supervise installations of FM radio systems and work with material of an evidentiary nature that require knowledge in radio or electrical matters.

* * * *

[178] Q Mr. Bryant, I hand you what has been marked and identified as Government's Exhibit Number 10; ask you if you have ever examined that piece of evidence.
A Yes. That looks like the one I have examined.
The one I did examine I marked on the inside left rail with my initials and the date.
I'll have to take it apart to check.
MR. RABINOWITZ: If—
THE WITNESS: It's a matter of taking—
THE COURT: All right.
MR. RABINOWITZ: If Mr. Sims is confident that this is the one, I'm confident it is the one, Judge.
I wouldn't keep the jury here while he tears it apart.
If you—
Are you confident—
[179] MR. SIMS: I can assure you it is the one.
MR. RABINOWITZ: That's good enough for defense counsel.
MR. SIMS: No doubt about it.

By Mr. Sims:

Q What test did you perform on that?
A Well, when I received it at the laboratory, it had a 12-volt battery setting on top of it with a strap and the wires in the back connected to it. I turned it on to see if it would work.
Q Did it?
A Yes; it did.
Q Did you have an opportunity to examine the crystals?
A Yes; I did.
Q What was the result of that examination?
A There were five crystals placed inside in Channels 1 through 5, and the first three crystals were on the

Norfolk, Virginia Police Department, and the third crystal was on the Virginia Beach Police Department, or fourth crystal, and the fifth crystal was on a Humble Communications Company.

Q Were you able to determine the number of the third crystal—the frequency?

[180] A Yes.

I have that in my notes.

Q Would you refer to that, please?

A It's 156.21 megahertz.

Q Thank you.

Does anyone else in this area use these frequencies?

A The only ones authorized to use the frequencies are the ones stated prior—the Virginia Beach Police, Norfolk Police and Humble Communications.

* * * *

[182] GAYNOR HOLIDAY,

a witness called by and in behalf of the government, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Sims:

Q State your name and occupation, please, sir.

A Gaynor Holiday, Assistant Vice-President and Rental Agent for Delaware Valley Financial Corporation.

Q In that capacity do you have an opportunity to manage a residence at 6420 Wailes Avenue?

A Yes, sir.

Q Where is that located, sir?

A In Norfolk, off of Virginia Beach Boulevard.

Q Did you have an opportunity to rent that house on the 23rd day of August 1972?

A Yes, sir.

Q Do you recall the name of the person you rented it to?

A Yes.

Mr. Allen Norris.

Q Do you see Mr. Norris in the courtroom today?

A Yes, sir.

Q Would you point him out, please?

A The defendant.

MR. SIMS: Let the record indicate the [183] witness has pointed out Billy Gale Henry.

His name is not Allen R. Norris but is Billy Gale Henry. So, I'll refer to him as Mr. Henry.

THE WITNESS: Yes, sir.

By Mr. Sims:

Q I show you Government's Exhibits 14 and 15; ask you to inspect those and tell me whether you have ever seen either one of them before.

A Yes, sir.

Q Where have you seen them?

A At the house on Wailes Avenue when I met Mr. Henry.

Q Who prepared those documents?

A I did, sir.

Q Now, was there another opportunity for Mr. Henry to sign his name on either document?

Do you recall?

A He signed the lease only, sir.

Q In his—

A It isn't on this copy, sir.

That is his copy.

I have a photostatic copy of the original that he did sign.

Q In other words, the copy you have there is—

[184] A Would be the tenant's copy, and it's not necessary that they sign it.

Q Right.

Was that prepared contemporaneously with the original?

A Yes, sir.

Q Okay.

And you gave this copy that we've marked as Government's Exhibit 15 to Mr. Henry?

A Yes, sir.

Q Okay.
Now, may I see the original?
A This is a photostatic copy, sir.
The FBI Office in Newport News picked up the original.
Q All right.
Did you observe Mr. Henry sign his signature on the original lease?
A Yes, sir.
Q Okay.
What do you recall the rent of the house?
A One sixty per month, with a hundred dollars' security deposit.
Q Did Mr. Henry pay you that?
A Yes, sir.

* * * *

[190] Barbara Henson.

BARBARA LORRAINE HENSON,

a witness called by and in behalf of the government, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Sims:

Q State your name, please.
A Barbara Lorraine Henson.
Q Mrs. Henson, you live on Wailes Avenue; is that not correct?
A Yes, sir.
Q Where is your house in relation to 6420 Wailes Avenue?
A Right straight across the street.
Q Okay.
Do you recall the events around the 23rd of August 1972 surrounding 6420 Wailes Avenue?
A Yes, sir.
Q Would you tell the jury what you saw as far as that house is concerned?
A Well, on Wednesday morning about seven thirty there was two men that was looking—coming out of the

little white door from the house, and they come up to their car, and they got in and they left, backed out of the driveway and left, and about one o'clock one of them come [191] back to rent the house, and they stayed there about 30 minutes, when the real estate man come, and they went in the house, and the real estate man and the man walked out, and they had a little bit of trouble opening the door. So, the man that rented the house was trying to learn the lock, how to open it, and they got off the porch, and the man got in the car and the real estate man got in his and they left, and then on Thursday at 11 o'clock the two men returned with some gold drapes. They hung 'em up at the window and one in the bathroom, and they left about eleven fifteen.
Q Now, of the two men that you described, do you see one of them today—
A Yes.
Q —in the courtroom?
A Yes, sir.
Q Where?
A There.
MR. SIMS: Let the record reflect the witness has identified Billy Gale Henry.

By Mr. Sims:

Q Now, Mr. Henry came to the house, I think you stated, once with another man and then once he came alone?
A Yes, sir.
Q Do you think you'd be able to recognize the other man that he came with?
[192] A Yes, sir.
Q I hand you now photographs of some individuals,—I think it's seven individuals—and I believe, Mrs. Henson, that you were shown those photographs once previously by an FBI agent—
A Yes, sir.
Q —and you picked out the man that appeared at the residence with Mr. Henry?
A Yes, sir.

Q Would you review those and see if you can once again pick out that man?

Have you picked the man out?

Okay. Thank you.

MR. SIMS: I think I'll admit Government's Exhibit Number 27 at this time, which is the photograph she picked out, Judge.

THE COURT: All right, sir.

* * * *

[196] NICHOLAS V. O'HARA,

a witness recalled by and in behalf of the government, having been previously duly sworn, testified further as follows:

DIRECT EXAMINATION

By Mr. Sims:

Q Agent O'Hara, I hand you what has been admitted as Government's Exhibit Number 27; ask you if you can identify that, please.

A This is a photograph of John Oscar Luck.

Q Is he the fellow that you arrested at Wailes Avenue on the 28th of August right after the bank robbery?

A He was the second man that came out of the house August 28th after that robbery.

MR. SIMS: Thank you.

No further questions.

CROSS-EXAMINATION

By Mr. Rabinowitz:

Q Mr. O'Hara, you also arrested Mr. Luck at that time and Mr. Moore?

A Yes.

Q On the 28th of August?

A Yes.

Q At Wailes Avenue?

A Yes.

* * * *

[244] The jury returned to the courtroom at 6:18 p.m. and the following proceedings occurred in the presence and hearing of the jury:

THE DEPUTY CLERK: Members of the jury, have [245] you agreed upon a verdict?

THE FOREMAN: We have, yes.

THE DEPUTY CLERK: May I have it, please?

The defendant will please stand.

Members of the jury, hearken unto your verdict in Criminal Action Number 243-72-N—the United States versus Billy Gale Henry:

"We, the jury, find the defendant guilty as charged and of assaulting or putting in jeopardy the life of Robert Woodcock in the commission of such offense as charged in the indictment."

Signed "Robert A. Combs", Foreman.

Dated March the 7th, 1973.

Members of the jury, is this your verdict, so say you all?

(The jurors nodded and indicated in the affirmative.)

* * * *

[247] [THE COURT]: I will deny the motion for a new trial; direct that judgment be entered on the verdict returned by the jury.

All right, gentlemen. Are you all ready to proceed to dispose of the matter now?

MR. RABINOWITZ: If your Honor please, we waive the report.

THE COURT: All right, sir.

[248] All right, sir. I'll be glad to hear anything you have to say on behalf of the defendant; any evidence you wish to present concerning the disposition of the matter.

MR. RABINOWITZ: I would ask the Court to use its best discretion in the matter of sentencing, and I'm fully cognizant that the Court will consider the rights of the defendant in sentencing.

THE COURT: Thank you, sir.

The government have any comments?

MR. SIMS: No, sir.

THE COURT: All right, sir.

Let the defendant come forward.

THE DEPUTY MARSHAL: Come forward.

THE COURT: Stand right at the podium. It'll be easier for you.

Billy Gale Henry, you have heard the comments of your counsel. You have heard the evidence presented in this case. Is there anything that you would like to say now before the Court passes sentence upon you?

THE DEFENDANT: Well, I'd just like to say I'm a victim of a long chain of circumstances, and I still contend that I'm not the man that actively went to that bank and robbed those people of the funds, that I stand before you a fool rather than—than a provoked incident of violence, and [249] I have nothing more to say; just that.

THE COURT: Criminal Action 243-72-N—the United States against Billy Gale Henry: It is the judgment of the Court that the defendant be committed to the custody of the Attorney General, to be by him or his duly authorized representative confined in such institution as he may direct for a term of 25 years unless sooner released by operation of law.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK, VIRGINIA

Civil No. 75-453-N

BILLY GALE HENRY, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF HABEAS CORPUS 2255

Comes now Billy Gale Henry, Petitioner, and moves this court to issue a writ of Habeas Corpus vacating the sentence and setting aside the conviction of Criminal case No. 243-72-N, Eastern District of Virginia, U.S. District Court in Norfolk, Va.

JURISDICTION

Jurisdiction is pursuant to 28 U.S.C. 2255, and the Trial Court of this case.

PETITIONER

Billy Gale Henry, Petitioner, is an inmate of the USP at Leavenworth, Kansas—on conviction of 243-72-N, Denied on appeal to the U.S. District Court, and in the 4th Cir. AC 1413-73, and denied Certiorari S/C 74-5560. Petitioner was sentenced by the Honorable Judge Kellan to 25 years in custody of the U.S. Attorney General.

RESPONDENT

The United States of America, the U.S. Attorney General, and Norfolk's U.S. Attorney.

STATEMENT OF THE FACTS

The criminal complaint charged the Petitioner with having rented a house used as a "hide out" where two robbery suspects of a bank robbery (August 28th, 1972, United Bank of Virginia) were arrested and later convicted. (Luck and Moore.) The bank was located in the 600 block of North Military Highway—the same city block as the Main Office of the FBI—which is thoughtful. . .

Luck and Moore were apprehended the day of the robbery—Henry, Petitioner was never identified as having been in Norfolk or even in the State of Virginia on or about the day of the Bank Robbery. No knowledge, intent, or willingness was ever proved. Circumstantial evidence was used to prove the petitioner was a principle of the crime.

"Live fingerprints" were found in the teller's cage, of which element Petitioner is accused of performing—this "Direct Evidence" was ignored and/or overlooked, as the prints were not Petitioner's prints. (FBI Lab. Report.)

The only eye-witness to the bank robbery who could positively identify any of the participants, a Mr. Peterson, testified that the driver of the Getaway car had long Blond hair and was about 27 to 30 years of age. Mr. Peterson stated unequivocably that Petitioner was not the driver of the Getaway car.

To reiterate, what is the inescapable conclusion: the previously convicted Luck and Moore were the two bank robbers in the bank, the Petitioner was not the driver of the car, as stated by the eye-witness Mr. Peterson. Mr. Peterson identified Moore coming out of the bank, and said Luck was not the driver of the car. Luck and Moore having been arrested together with the fruits of the crime, seemingly they were the two robbers who went in the bank . . . and the 27 to 30 year old person with the long blond hair evaded capture. Petitioner is 48 years old, Brown Hair.

To prove Petitioner guilty, the Government used "hearsay testimony" from two ex-cellmates of the Petitioner . . . after having concealed them, failed to disclose, suppressed material evidence, used deception on the Court, violated the Court's discovery order, presented perjured testimony against Petitioner—all of which denied the Petitioner a fair trial and due process of law.

DENIAL OF DUE PROCESS OF LAW—PERJURED TESTIMONY OF MATERIAL VALUE PREJUDICED PETITIONER

1. Perjured Testimony—Government's witness Sadler "*Planned Pejury revealed.*"
2. Government's witness Nichols was a paid informer who violated "*MASSIAH RULE.*"
3. FBI and U.S. Att. used *deception* on the *Court, Defendant* and the *Jury.*
4. Violation of the Court's *Discovery Order*—Denial of *Due Process* and *Fair Trial.*
5. U.S. Attorney's Argument to Jury was *prejudice* to *Petitioner; Un-Fair Trial.*
6. Non-disclosure of Exculpatory Material Evidence—Favorable to Petitioner.
7. Incompetence of Petitioner to assist Counsel and/or ineffective counsel.

Due Process of Law and a Fair Trial is the issue petitioned to the court. An ulterior motive by the FBI should not be ignored—the deception and/or denial of due process of law and a fair trial lies in responsibility on the FBI and the Asst. U.S. Attorney who presented it to the Court: A foul blow to the Defendant and the Jury. Willingly and with knowing intent to try this Petitioner in an atmosphere of fundamental unfairness.

PERJURED TESTIMONY—GOVERNMENT'S WITNESS SADLER—"PLANNED PERJURY REVEALED"

The Government used hearsay testimony from an ex-cellmate, Joseph D. Sadler, who called the FBI "in rela-

tion to his case." Not as his public spirited Duty. Before Sadler called the FBI he discussed the conspiracy with one of his friends in the jail cell, other than the Petitioner. This sworn statement was taken after the Petitioner's trial. This affidavit is on file in the FOURTH CIRCUIT COURT OF APPEALS, C/A 1413, (1973) Billy Gale Henry. . . . .

Subscribed and sworn to by Joseph Ray Conway. . . .

> "I met Mr. Sadler at the Norfolk City Jail, and got very close as a friend. We were in the same cell as Bill (Billy Gale Henry), and we talked together quite a lot. One night, Mr. Sadler told me he couldn't stand going back to prison. I asked him how he could keep from going, he told me that he would tell the FBI that Henry robbed the United Virginia Bank of Janaf Shopping Center. I said, 'but Billy has never admitted robbing no kind of bank.' Sadler said, 'I know, he never admitted it, but I'll tell this to the FBI and they'll keep me from going to prison.' I said, 'That is a hell of a way to keep from going back,' and he said, 'I have a lot to look forward to on the street, and I will do anything to get back out there.' "

Conway was contacted after the Henry trial which was March 7, 1975, and the Affidavit was signed and sworn to April 13, 1973.

At the trial Sadler attempted to testify to a certain Henry conversations allegedly implicating himself in the bank robbery. On cross-examination Sadler didn't know "What city the bank was in (He said Virginia Beach, Virginia, Not so.) (Tr. 141) Sadler didn't know how many robbers were involved, or how the robbery was carried out, in confusion told a "fairy tale" about a woman driving the car, and a robber standing on the sidewalk outside the bank. A description of a robbery which didn't fit into the facts of the case, as a private citizen had witnesses the robbery from only a few feet and described only three men involved—and this witness who did not have an ulterior motive to fabricate said Henry didn't look like anyone he could identify.

When Sadler was asked if he was made promises for his testimony, TR. 143. "No sir"

Def. Att. "How did you contact the FBI with this testimony?"

Sadler "How did I contact the FBI? I called the FBI Agents."

Def. Att. "You did this—"

Sadler "Yes Sir."

Def. Att. "As your public-spirited duty?"

Sadler "In relation to my case.

At the advice of my attorney."

Sadler was a Commonwealth of Virginia prisoner—who did not face any Federal charges—calling the FBI, "In relation to his case" after having made the statement to Joseph Ray Conway tend to explain the nature of the relationship between Sadler and the FBI.

When Sadler called the FBI, which was about December 12, 1972, Joseph Ray Conway was mysteriously transferred to the State Farm, Conway was not a Federal prisoner, although his trial process was not complete. This was a first payment from the FBI for the expected testimony from Sadler—Henry was transferred also, to a different jail. The FBI did this to avoid Henry becoming aware of the informers who were to testify—in the case of Sadler, Purjure himself at the Henry Trial.

On December 27, 1972 at the Motion for Discovery the Government failed to disclose these statements of Henry, and instead, used this perjured testimony as a surprise to the Defense.

Deception was used on the Court, Defendant, and the Jury. The Court had ordered the discovery of; "Statements of the Accused" referred and made clear in several different ways, to use this perjured testimony was denial of due process of law, and denial of a fair trial.

Planned perjury—this was not incidental—this perjury was planned and executed by deception by a person with evil intent and an ulterior motive. *Napue* v. *Illinois*, 360 U.S. 264,

"the same result obtains when the state though not soliciting false evidence, allows it to go uncorrected when it appears."

Giglio v. *United States*, 405 U.S. 150 (1972)

C. J. Burger "A new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury. . .' Napue, supra, at 271."

Moore v. *Illinois*, 408, U.S. 798, at 2569. . . Quoting Napue,

"This court held that the failure of the prosecutor to correct the testimony, which he knew to be false, denied Napue due process of law, and this was so even though the false testimony went only to the credibility of the witness."

Sadler was the only evidence showing Henry at the scene of the crime. Perjured, hearsay testimony, from a felon who intended to and did bargain with FBI.

GOVERNMENT'S WITNESS NICHOLS WAS A PAID INFORMER WHO VIOLATED MASSIAH RULE

II

MASSIAH RULE, which is to say that the Police or FBI and/or the Government cannot send a paid informer or agent of the FBI to learn more information and facts of the case for investigative purposes—because the alleged violator of the law has a right to representation of counsel while being interrogated.

Nichols, one of the informers at the trial of Henry, called the FBI and was released from jail. The Agent he called was an agent he had worked for and with in the past, Special Agent Jerry Coughlin. At this time Agent Coughlin sent Nichols back to the Norfolk City Jail to visit the other informer Sadler who had not made contact at this time. On this same day, about December 3rd or 4th, 1973—Nichols called Henry out on a visit. Nichols is a black man and Henry a white-man.

When Henry was transferred to the Portsmouth City Jail—Nichols came to see Henry there on at least two occasions. Nichols was not an approved visitor, as to visit requires a special kinship or business. The FBI and/or the Sheriff gave Nichols special permission to visit. (see [can't copy—but have sworn statement from sheriff]

The visits were not conducted in the usual manner—which is at a window on each floor. Instead, Henry was called to visit the informer downstairs in a specially built room next to the Sheriff's Office—evidently so the visits can be monitored and/or taped.

Henry did not give his permission, and in fact, asked the informer not to return on a visit. On one occasion Henry refused to visit because he didn't know who the visitor was, and in fright of being interrogated by the black man refused to come out for the visit, and/or told them that they were after the wrong Henry.

Edward B. Nichols was a paid informer for the FBI prior to the Henry case investigation, received pay and rewards for his investigation work in the Henry case, and has worked for the FBI since that time. This is violation of the standards and guide-lines set-out by the U.S. Supreme Court in the *Massiah* case. Denying the "Post Indictment Billy Gale Henry" of his right to counsel while being interrogated by an "agent-informer" of the FBI as part of their investigation of his case. Denial of Constitutional Rights—of *due process* and a *fair trial.* Henry had aggressively dismissed the FBI agents as they attempted to question him, informer E. B. Nichols was used to engage Henry in conversation for the FBI and their investigation. Violation of Due process and a fair trial.

FBI AND THE U.S. ATT. USED DECEPTION ON THE COURT, DEFENDANT AND THE JURY

III

The evidence against the Defendant was a thin web of inconclusive circumstantial evidence with no direct evidence of guilt. There was no witness showing Henry in Virginia on the 28th of August. When Agent-in-charge

of the case, Mr. O'Hara was asked if he had any witness placing Henry with Luck or Moore on the 28th, he said, "No."

This was the basic need of an informer to give even the slightest piece of evidence that Henry was in Virginia on that date. Asst U.S. Attorney Sims, was reprimanded in Judge Hoffman's courtroom during a hearing in the last part of November or early December 1972, for conferring in whispers. The Honorable Judge stated flatly that the FBI was not running the show.

The transferring of Henry and Conway away from the informer Sadler, was a move to hide the existence from Henry and the Court. Even when they agreed to supply statements of the accused, during the Discovery Hearing 12/27/72 they defied the court's discovery order and did not disclose.

The FBI is a professional investigative agency—from their interviews with Sadler they would have known, or should have known, that it was a fabricated "Fairy tale." It is strong possibility, without proof, that they actually planned to have Henry, Sadler and the other informer Nichols placed in the same housing.

When Henry was committed to the Norfolk City Jail, the jailer made the statement that we have a special place for you, a series of changes in cell and housing arrangements envolving all three moving within the first few days in the jail. All three were in different places, and all three ended in the same small tank—which was not crowded, and the rest of the jail was crowded to overcrowded.

The informers were kept a tightly guarded secret—two days before the trial Asst. U.S. Att. Sims filed a habeas Corpus testimony writ . . . knowing the odds were a million to one that the Defense attorney would not see this on the Docket. He called this notification that Sadler would testify. Nothing was filed about Nichols.

Planned—Planned deception of the Court, Defendant, and the Jury. Denial of Due Process of Law and a fair trial. The denial is not a reflection on the Court and Your Honor—the FBI and the Asst. U.S. Attorney planned it.

NON-DISCLOSURE, VIOLATION OF COURT'S DISCOVERY ORDER, DENIAL OF DUE PROCESS

IV

Boxed-in is from the written Motion of Discovery, TR.D. is answers to it.

Page #2, No. 6

6. Any statements, documents of any nature and at any time made and/or signed or executed by the defendant in regard to or in relation to these proceedings, if any there be, and any statements made and/or given by the defendant made orally and thereafter reduced to writing, if any there be, in regard to or in relation to these proceedings.

Mr. Sims; "The statements of the Defendant—We'll furnish those. I think they're entitled to those."

page #3, No. 16 . . .

16. A copy of the conviction records, if any, of any of the prosecution witnesses.

Mr. Sims; "Number 16: We'll furnish him the FBI rap sheet that we have in our possession.
Def. Att. "You will furnish 16?"
Mr. Sims: "Yes."

page #4, No. 24 . . .

24. All statements, or conversations, or writings of the accused, or of third persons overhearing the accused, who might testify to statements or conversations of the accused.

Mr. Sims: "We'll furnish statements of the accused, if any."

In these agreements, there was total understanding—both attorneys and the Court were looking at their copy of the written Motion. The Government agreeing to furnish the statements in two places in one Hearing—specifying oral, over-heard, conversations repeated of which someone who might testify.

Failure to do this was violation of the Court's Discovery order. Not to furnish is to say, "*No statements exist.*" As the Defense was not furnished any statements, the Defense took the lack of response as a declaration that no such evidence existed. This is Deception of the Defendant—denial of due process and a fair trial.

Possession of these statements and information was in the Government's hands, or file at the time of this hearing. It was the Government's responsibility to come forward for discussion of whether they should or shouldn't disclose. Silence was and is a statement of un-truth. A Supreme Court Justice said, "the cruelest lies are often told in silence."

A new trial is required. *Brady* v. *Maryland*, 373 U.S. 220, *Barbee* v. *Maryland*, 331 F.2d 842 and many other cases. . . . .

ASST. U.S. ATTORNEY'S ARGUMENT TO THE JURY PREJUDICED DEFENDANT, UN-FAIR TRIAL

V

Direct evidence is positive proof. Fingerprints of a Defendant at the scene is regarded as proving that he was there.

"Live fingerprints" were lifted from the Teller's cage of the bank of which Henry is accused of robbing. These fingerprints were not Henry's. (FBI Lab Report.) However, Mr. Sims made statements to the Jury in his closing Argument that,

> "Billy Gale Henry is the Big Man who went in the Bank, gashed Mr. Woodcock's head, and took the money."
>
> "Henry is the Big Man.
>
> "The Cellmates told the truth."
>
> "Left no fingerprints."

These statements are statements of fact—this is testimony—not from the witness stand, but from a person who does not know.

Mr. Sims said no fingerprints were left—but fingerprints were left, and he knew they were not Henry's.

And it is a fact that these prints were the prints of the man who went into the bank and did the things Mr. Sims accuses Henry of doing.

While the U.S. Att. Sims has lots of room to address the jury—he is not allowed to state facts that were not testified to in court. Not one witness said they saw Henry at the bank, Not one said he was even in Virginia on the day of the crime.

The Government stated flatly that Henry was the man who entered the Teller's Cage, gashed Mr. Woodcock's head, took the money. This is not proven—to state repeatedly to the jury is to abuse his privilege.

Mr. Woodcock said he couldn't tell if the man was black or white.

Mr. Sims also, said, "they're pros, they're organized, left no fingerprints.

"This was a pro operation."

All of these statements by Mr. Sims were very prejudicial to the Defendant. Mr. Sims cannot be allowed to say anything beyond what was proven, and to use household words of organized crime and professional criminals is to prejudice the Defendant in the eyes of the fact finders.

"Live fingerprints" are direct evidence that this Defendant was not the man who went into the Teller's cage . . . it is not a Fair Trial to allow the Mr. Sims to lie by saying these prints didn't exist, testify as if he were there and was a witness.

A New Trial is required.

NON-DISCLOSURE OF EXCULPATORY EVIDENCE FAVORABLE TO THE DEFENDANT . . . MATERIAL

VI

The Government had agreed to furnish all scientific test result, fingerprint test results—the statements of the Defendant, the statements of the accused, the conviction records of the prosecution witnesses—and in general, the

Court ordered the U.S. Attorney to furnish all evidence favorable to the Defendant. None of this came to pass . . .

To this day there is evidence in the record favorable to the Defendant, which was never known about by the Defendant—the only evidence disclosed to the Defendant has been incriminating. Evidence of exculpatory nature, known of is:

1. Statement of the Defendant.
2. Statement of the Accused.
3. "Fingerprint test results."
4. Conway as a material witness.
5. two other witnesses known to Petitioner as "Joey" and Robert.

All of this was recoverable before trial—but not known of and recoverable by the Defendant. The FBI and Government knew of all of the above evidence long before trial, and chose to suppress the material evidence and favorable information, rather than disclose.

The Government turned its head—which is denial of due process and a fair trial. The Defense made requests for all this information and much more at the Hearing on a "Bill of Particulars" and "Motion for Discovery" which had total agreement, but the Government lived a "lie" as it didn't keep the Discovery Order.

The case law on this point is endless. This pro se Petitioner doesn't have much up-to-date information, but controlling cases make it clear of the rule:

Brady v. *Maryland*, 373 U.S. 83

Giles v. *Maryland*, 306 U.S. 66

Barbee v. *Warden*, 331 F.2d 842

Clay v. *Black*, 479 F.2d 319 (1973)

U.S. v. *Polisi*, 416 F.2d 573

To clearly see the "area of ignorance" (where the Defendant was at trial) not one defense witness appeared . . . the trial is a quest for the truth . . . a penniless pauper cannot defend himself against a wealthy and well oiled prosecution team if he doesn't even have due process of law and a fair trial. "A NEW TRIAL IS REQUIRED."

INCOMPETENCE OF PETITIONER TO ASSIST COUNSEL and/or INEFFECTIVE COUNSEL

VII

The Defense has the responsibility to make timely motions, moves, and objections—the Court cannot "baby sit" the Defense needs and/or call attention to what it should do and when . . . without question, from the beginning of the trial process, that is pre-trial motions and hearings, the Defense of Henry has fell short of what it should have been.

Ralph Rabinowitz was appointed to represent the Petitioner. However, this attorney never visited the Petitioner—not one time. This is an excellent example of the non-interest and non-concern of the Defense Counsel.

INCOMPETENCE OF PETITIONER TO ASSIST COUNSEL

Henry was held in jail without proper medication for several months, and in fact given a "wrong medication" that caused him to lose his sense of awareness and ability to talk and speak on his own behalf. On his appearance before Judge Hoffman Henry spoke intelligently and with composure, months later, at the time of trial he let himself be "spun helplessly through a whirlwind of judicial procedure at the trial."

This in part, or whole, was ineffectiveness of counsel. If the counsel had been effective enough to protect the rights of his client, then being kept like this in jail, without medication on the day of trial, would not have been of consequences—however, if an indigent defendant is to be given counsel by Government appointment, it should not be allowed to fall short of due process of law.

In his rational mind, this Petitioner would not allow himself to be tried without a defense. *NOT ONE DE-*

FENSE WITNESS. NOT ONE VISIT FROM THE ATTORNEY.

INEFFECTIVE COUNSEL

U.S. v. *Smith*, C.A. 4th (1965) 353 F.2d 166. In this case it has a meaning that Appointed counsel is reason to review on claim of deprivation of Constitutional Rights.

The Fourth Circuit has strong ruling on their approach to the effectiveness of appointed counsel. In the instant case, their rules call for an evidentiary hearing to review the case to establish whether or not the indigent defendant was given a fair trial with his rights to due process of law.

MEMORANDUM OF POINTS OF LAW

1. PERJURED TESTIMONY—GOVERNMENT'S WITNESS SADLER "PLANNED PERJURY REVEALED"

> "A new trial is required if the false testimony could . . . in any reasonable likelihood have affected the judgment of the Jury." *Giglio* v. *United States*, 405 U.S. 150.

Giglio ruled that the jury should know if the credibility of the witness is at issue. Here the jury was entitled to know of Sadler's conversation with Conway. Sadler planned to commit perjury and had an ulterior motive.

> *U.S.* v. *Polisi*, 416 F.2d 573, (CA2)
> "When a conviction is shown to be based even in part upon perjured testimony, this Court should not merely inquire as to the peruse effect of the perjury, but should order a new trial if without perjury the jury might have not convicted.

> *Miller* v. *Pate*, 386 U.S. 1 (1967)
> "If the Government knows that a piece of evidence is false or that a witness is perjuring himself or is unreliable, it has a duty not to use such evidence in order to gain a conviction.

> *Napue* v. *Illinois*, 360 U.S. 264
> "the same result obtains when the state though not soliciting false evidence, allows it to go uncorrrected when it appears."

Sadler was a devious and deceptive tactic by the Government. Conway's affidavit explains the ulterior motive of perjury, the Government knew of Conway —the arranged his transfer.

2. GOVERNMENT'S WITNESS NICHOLS WAS A PAID INFORMER WHO VIOLATED "MASSIAH RULE"

Government's witness Edward B. Nichols has been a paid informer prior to the Henry case, and has since that time worked for the FBI as an informer, gathering information as an "arm of the law" and under the "color of law enforcement."

The FBI used their influence to obtain Nichols release and then sent him to visit the Petitioner in the Norfolk City Jail and the Portsmouth City Jail to ask the Petitioner questions about the crime he was indicted for.

Petitioner had refused to talk to the FBI and they used "informer Nichols" to do something the FBI could not do, question the Petitioner—all of this without the presence of counsel.

Massiah v. *U.S.*, 377 U.S. 201 says that the Supreme Court held that statements of an accused deliberately elicited from him in the absence of counsel after he had been indicted are inadmissible.

The "MERE PRESENCE" of Nichols on the witness-stand was prejudicial to the Petitioner, and this is denial of due process and a fair trial.

3. FBI AND U.S. ATT. USED DECEPTION ON THE COURT, DEFENDANT AND THE JURY

4. VIOLATION OF THE COURT'S DISCOVERY ORDER—DENIAL OF DUE PROCESS AND FAIR TRIAL

The "case law" on these two points is endless. I'll not burden the Court with quoting the cases . . . it is plain

and simple that the defendant is denied due process and a fair trial.

Brady v. *Maryland*, 373 U.S. 83
Giles v. *Maryland*, 386 U.S. 66
Berger v. *U.S.*, 295 U.S. 75
Miller v. *Pate*, 386 U.S. 1 (1967)
U.S. v. *Augenblich*, 393 U.S. 348
Napue v. *Illinois*, 360 U.S. 264
U.S. v. *Polisi*, 416 F.2d 573
U.S. v. *Bryant*, 439 F.2d 642

The evidence and/or information sought on discovery, and that was used in the deception by the FBI and the Asst. U.S. Attorney was of material value to the defense. The Defense had absolutely no idea of what evidence was against the Defendant, except that he had been identified as having rented a house where two bank robbery suspects had been arrested. The Defense ws crippled by the failure to disclose.

Having the Discovery Order from the court regarding "Statements of the Defendant and/or Accused"—when none were produced left the Defense with the opinion that none existed. Had the Government stated flatly that statements existed, but refused to disclose them would have been sufficient notice of evidence of this nature. But, *the agreement to furnish statements, and then not producing them was and is, DECEPTION—ON THE COURT*, AND *JURY*.

No direct evidence has ever been produced that put the Defendant at the bank, or robbing the bank. No witness places the Defendant in the State of Virginia within several days of the crime. The ulterior motive of the Deception and Non-Disclosure was to use the hearsay evidence of the Two ex-cellmates to place the Defendant in Norfolk on the day of the Robbery.

This Honorable Court can see through this tactic—and know that this is and was denial of due process of law, and therefore, denial of a fair trial. An evidentiary hearing is required to allow Petitioner to prove these facts.

5. ASST. U.S. ATT.'S Argument to Jury was PREJUDICE to DEFENDANT; UN-FAIR TRIAL

Gradsky is a case, but this Petitioner doesn't have the citation to identify it. However, it says that a statement of the prosecuting attorney vouching for the credibility of the Government witnesses was prejudicial error which may have contributed substantially to conviction.

In the instant case, Asst. U.S. Attorney made this statement in his argument to the jury,

"The cellmates told the truth."

This was in reference to the two "convicted felons" who were ex-cellmates of the Petitioner, Joseph D. Sadler and Edward B. Nichols, who informed to the FBI, and stated that Petitioner had told them about the bank robbery.

Prejudicial!!! This was a foul blow to the Defendant. It is true that this statement should have been objected to . . . but in view of the ineffectiveness of counsel, and the incompetence of the Defendant who had not had medication when he had it prescribed for him. The medication Petitioner received was wrong, but on the day of the trial, and late in the day, he repeatedly asked for medicine and only received aspirin.

Mr. Sims, the Government's attorney, made many other prejudicial remarks: which were not facts of testimony from the witness-stand or evidence, so the remarks were actually testimony from Mr. Sims who was not a sworn witness, such as: "Billy Gale Henry robbed the bank." "Henry was the Big Man in the teller's Cage." "Billy Gale Henry went in the bank, gashed Mr. Woodcock's head, fired shots . . . took money."

Mr. Sims did not know this. He vouched for the ex-cellmate. No witness had identified Henry at the bank, Mr. Woodcock said he couldn't tell if it was a black man or a white man. But Mr. Sims took the liberty of un-sworn testimony and said Henry was the Big Man in the teller's cage. He also said in this argument to the Jury, "they left no fingerprints."

Actually there were fingerprints left in the teller's cage where he said Henry had been as the robber who gashed Mr. Woodcock's head.

The "Live fingerprints" were not Henry's. The FBI testified to this at Trial. Mr. Sims knew this, it was his case from the start of prosecution. He repeatedly made all of these statement and more about the crime being professional criminals.

King v. *U.S.*, 372 F.2d 383. This case says, it is misconduct for a prosecutor to make an assertion to the jury of a fact, either by way of argument or by assumption in a question, unless there is evidence to the fact.

Mr. Sims used his argument as un-sworn testimony to prejudice the Defendant with other remarks,

> "They're in; they're out, . . . it's a pro operation. They're organized."

This is and was un-sworn testimony. This is to say the Defense was not allowed to cross-examine the witness against him. *Barber* v. *Page*, 390 U.S. 719 (1968).

6. NON-DISCLOSURE OF EXCULPATORY MATERIAL EVIDENCE—FAVORABLE TO DEFENDANT, petitioner

Points of law is endless. . . . and the same relative point is that when the FBI and Government agreed to furnish the favorable information and evidence, not having furnish it, left the Defense of the opinion that none existed.

Brady v. *Maryland*
Giles v. *Maryland*
Barbee v. *Warden*
Clay v. *Black*
U.S. v. *Polisi*

The absence of objection is in that the counsel for the indigent defendant was less than adequate counsel, and appointed by the Government.

Denial of due process of law and denial of a fair trial, a new trial is required.

7. INCOMPETENCE OF PETITIONER TO ASSIST COUNSEL and/or INEFFECTIVE COUNSEL, App.ted.

Petitioner has only one case at hand—the law facilities are limited here. *U.S.* v. *Smith*, C.A. 4th (1965) 353 F.2d 166.

This is to say that appointed counsel is reason to review on claim of deprivation of Constitutional Rights.

The Petitioner, as mentioned before, had been kept in jail for a long period of time, had had hearings in your court relative to medication with testimony from the Jail doctor—and Petitioner was not of rational state of mind that he could assume leadership of the Defense Counsel in a U.S. District Court on a charge of bank Robbery.

On arrest, the Petitioner had no money and had to rely on the Government for appointed counsel, at no time did the Court make him aware that he was individually responsible for the attorney's performance—that if the appointed counsel was ineffective that the Defendant is legally denied due process of law and denied his rights to a fair trial.

If a new trial is granted, this Petitioner will assume this responsibility—with warning in open court—but, as the case stands now, the ineffectiveness of the appointed counsel was the product of the lackadaisical attitude of his approach to defending his client.

Not one visit from the appointed counsel. Not one defense witness. No defense.

PRAYER

Petitioner prays this Honorable Court will vacate and set aside the conviction and remand for an evidentiary hearing, because:

1. Perjured Testimony of Government's witness Sadler was revealed as planned perjury.
2. Government's witness Nichols was a paid informer who violated Massiah Rule.

3. FBI and U.S. ATT. Sims used deception on the Court, defendant and the Jury.
4. Violated the Court's Discovery order—denied due process, and a fair trial.
5. Non-disclosure of exculpatory material evidence—favorable to the Defendant.
6. U.S. Attorney's Argument to Jury was prejudice to Petitioner, un-fair trial.
7. Incompetence of Pet. to assist Counsel and/or ineffective counsel.

Any one of the points on this brief is enough to reverse and/or vacate the sentence—but, the compilation of the denials of due process of law, and a fair trial is enough to require that the sentence be vacated.

Respectfully submitted,

/s/ Billy Gale Henry
BILLY GALE HENRY, pro se
P.O. Box 1000
Leavenworth, Kansas 66048

Subscribed and sworn before me this 17 day of July, 1975.

/s/ Roger Stafford
Notary Public
ROGER STAFFORD
Parole Officer
U.S. Penitentiary
Leavenworth, Kansas 66048
Authorized by Act of July 7, 1955,
to administer oaths (18 U.S.C. 4004).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

NORFOLK, VIRGINIA

Civil Action Case 453-N-75

BILLY GALE HENRY, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

AMENDMENT OF THE COMPLAINT

by

Plaintiff, Prose

Bill Henry, Prose
Box 1000 # 02240-135
Leavenworth, Kansas
66048

Bill Henry, Prose
PO Box 1000
Leavenworth, Kansas
66048

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

NORFOLK, VIRGINIA

Case No. 453-N-75

BILLY GALE HENRY, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

AMENDING THE PETITION—3255 on REMAND

Plaintiff, Billy Gale Henry, moves this Honorable Court to vacate the sentence and set aside the conviction.

JURISDICTION

Jurisdiction is pursuant to 28 USC 2255, Motion to Vacate the sentence.

PLAINTIFF

Plaintiff, Billy Gale Henry, is an inmate of the U.S. Penitentiary at Leavenworth, Kansas; convicted in the U.S. District Court E.D./Va. in the court of the Honorable Richard Kellam, 243-72-H jury trial on 3/7/73. Plaintiff made a Motion for a new trial and was denied, appealed 1413-73 to the Fourth Circuit court of appeals and was denied, petitioned for a Writ of Certiorari S/C 74-5560 and was denied 4/14/75. Plaintiff is serving a twenty-five year sentence in custody of the U.S. Attorney General.

RESPONDENT/DEFENDANT

The United States of America, the United States Attorney General and the U.S. Attorney for the Eastern

District of Virginia are the Respondents for the United States of America.

STATEMENT OF FACTS

Petitioner was arrested November 1, 1972 by FBI agents in Atlanta, Georgia; transported to Norfolk, Virginia on November 20, 1972 where he was 'housed' in the Norfolk City Jail as a Federal prisoner charged with 2113 (a & d) for the Robbery of the United Virginia Bank, Seaboard/Branch in the Janaf Shopping Center Norfolk, Virginia on August 28, 1972.

Between November 20 and November 27, 1972 the Plaintiff and other inmates were switched around from different living units, the plaintiff being housed with several other inmates, namely Joseph D. Sadler, Edward B. Nichols, and Joseph Ray Conway. Sadler and Nichols were Agent/Informers for the FBI and later testified at the criminal trial of the Plaintiff Billy Gale Henry on 3/7/73.

On or about the 13th of December 1972 Henry and conway were transferred from the Norfolk City Jail—Henry being housed in the Portsmouth City Jail in Portsmouth, Virginia—Conway being sent to the State Prison.

December 27, 1972 Plaintiff was present in court on a Bill of Particulars and a Motion for Discovery and Inspection—both of which were written Motions before the court, The open Court Hearing was transcribed.

February 7, 1973 a Suppression Hearing was held relative to a residence where two bank robbery suspects had been arrested the day of the crime. The lease agreement of this residence having been found in the getaway car—the Petitioner (Henry) having been identified as the individual who had leased the house. At this same hearing the Jail Doctor and the Plaintiff gave testimony relative to the treatment of the Plaintiff in the Portsmouth City Jail.

At Plaintiff's trial 3/7/73 the Government presented approximately 24 witnesses to prove the Plaintiff was the "Third Man" who had not been apprehended the day of the crime. Two robbers had entered the bank while one

waited in a getaway car, $84,000.00 was taken after one robber jumped the counter, struck a teller and took 44 night deposit bags. Plaintiff is serving 25 years in custody.

STATEMENT OF THE CASE

August 28, 1972 the crime at bar was committed by three (3) men. Two suspects were arrested the same day as a result of a 'lease agreement' being found in the getaway car. The residence had been leased by a 'Allen R. Norris.'

September 12, 1972 it was learned that Billy Gale Henry had used the name of 'NORRIS' and Billy Gale Henry (Plaintiff) was identified as having leased the residence.

September 22, 1972 a Complaint was filed and an Arrest Warrant isued. The affidavit supporting the Arrest Warrant contained the following facts:

1. Henry used the name of 'Norris.'
2. Henry leased the residence where two suspects (Luck and Moore) were arrested the same day of the crime.
3. A copy of the lease agreement was found in the Getaway car—Henry's fingerprints were found on the lease agreement.
4. Henry was an associate of Luck and Moore—Citizens having seen them together in the Norfolk Area.

(Probable Cause Did Not Exist . . . An Arrest Warrant should not have been issued)

November 1, 1972 Plaintiff (Henry) was arrested in Atlanta, Georgia pursuant to the above Arrest Warrant.

November 15, 1972 a Federal Grand Jury indicted Billy Gale Henry for the bank robbery.

November 20, 1972 Plaintiff arrived in the Norfolk, Virginia U.S. Marshal's Office and placed in a 'Hold Over' cell. FBI Agent N.V. O'Hara came into the Marshal's Office to get information from the Plaintiff (Henry) about the bank robbery of which Henry was already indicted. O'Hara opened conversation with the Plaintiff without the presence of counsel, and without an intelligent waiver of counsel. O'Hara obtained an agreement to interview Henry about the crime (Post-indictment) and learned that Henry had known Moore for a long time. (Denied the Right to Counsel—Absent an intelligent waiver of right to counsel.)

November 20, 1972 the Plaintiff was 'housed' in the Norfolk City Jail on instructions from Agent O'Hara. During the first week Henry was moved to a small Unit, on the same day an Agent/Informer for the FBI, Edward B. Nichols, was moved to the same unit. The Agent/Informer, Nichols, gathered statements of conversation from the Plaintiff (Henry) and passed the statement to the FBI Agents. Shortly thereafter Nichols was released from the Norfolk City Jail, partial payment for the paid informer for the FBI who had gathered statements from the Plaintiff who did not have counsel present and had not intelligently waived his right to counsel.
(Denial of the Right to Counsel—Absent an intelligent waiver of right to Counsel)

November 27, 1972 Joseph D. Sadler was moved into the same Unit of the Norfolk City Jail with the Plaintiff and Edward B. Nichols. When Nichols was released from jail, Nichols returned to the Jail to visit Sadler and Henry. On the visits to Henry Agent/Informer Nichols would question Henry about the case.

December 12, 1972 Joseph D. Sadler called the FBI Agents and told them he had information in the form of incriminating statements made by the Plaintiff (Henry). Agents interviewed Sadler and as a result of this interview Henry was moved from the Norfolk City Jail to the Portsmouth City Jail.

Joseph Ray Conway was also moved from the Norfolk City Jail: It was learned after the Henry trial on 3/7/73 that Conway knew that Sadler planned to commit perjury at the Henry trial. The FBI knew of Conway and had Conway moved to the State Prison, even though Conway faced additional charges in Virginia Courts.

Sadler had told the FBI Agents that the Plaintiff (Henry) had admitted robbing the bank at Bar: Repeating statements allegedly made by Henry. In conversation with Conway, Sadler had told Conway that Henry had never admitted robbing the bank but that he would say anything on the witness-stand to get out of jail. (Knowing Use of Perjured Testimony—Perjury by a Material Witness to Convict) SUPPRESSION OF EXCULPATORY EVIDENCE

December 12, 1972 Henry was housed in the portsmouth City Jail where he (Henry) was not given proper medication, and exposed to the following Jail conditions:

a. An overdose of medication that should not have been given at all.

b. Jail Physician refused to give Henry proper medicine and medical care.

c. Committed to 'Solitary Confinement' by Doctor as treatment

d. Interrogated by an Agent/Informer (Nichols) who gathered statements of the Plaintiff without the presence of counsel, and absent an intelligent waiver of the right to counsel.

(Competency to stand trial destroyed by cruel and unusual punishment, jail conditions)

December 27, 1972 at a hearing on a Bill of Particulars and Motion for Discovery and Inspection there was an agreement relative to incriminating statements if any such statements existed: The Government's Counsel agreed to furnish:

a. Statements of the Defendant
b. Statements of the Accused
c. Rap-Sheets of Prosecution Witnesses
d. All favorable information to the Defense. (Brady Material)

None of the above was furnished—even though all of the above existed. Failure To Disclose is Saying None Exist. (Non-Disclosure of Material Evidence Favorable to the

Defendant—Violation of the Court's Discovery Order—Suppression of Exculpatory Evidence, Material.)

February 7, 1973 the Jail physician, Dr. Barclay, was subponead to testify in regards to the treatment of the Plaintiff (Henry). Henry also testified. On direct Examination Henry testified he suffered from a degree of insanity. The Defense Counsel expressed a need for Henry, stating that Henry should be examined by a Specialist. The Court ordered that Henry would be allowed to pay a doctor/s/ to visit him, but the Government's duty met by the Jail Doctor.

Two doctors, one a specialist, visited Henry at Henry's expense, the specialist furnished the court a report. The second doctor prescribed medication which was not allowed by the Jail physician, Dr. Barclay.
(A Competency Hearing should have been ordered on Defendant's stating Insanity)

March 7, 1973 at the Henry criminal trial, the Government's Counsel presented both Agent/Informers Nichols and Sadler. Both witnesses were material in value to the Government's Case.

Both Nichols and Sadler were a complete surprise to the Defense. The Defense had no knowledge of Joseph Ray Conway—the person in the cell with Sadler and Henry who had heard Sadler say that he would testify to false incriminating statements of Henry.

The alleged statements of Henry were unknown to the Defense until the trial; therefore, the Government's failure to Disclose as they had agreed at the Hearing 12/27/72 Motion for Discovery had become a material factor.

In conclusion of the "statment of the case," we see the following:

1. Probable Cause did not exist . . . An Arrest Warrant should not be issued.
2. Denied the right to counsel . . . when O'Hara interviewed in Marshal's Office.
3. Denied the right to counsel . . . when Agent/Informer Nichols gathered statements of the Plaintiff in the Norfolk City Jail, and visits.

4. Knowing Use of perjured testimony (Sadler) Suppression of exculpatory Evidence due to the moving of Henry and Conway—to separate all three.
5. Competency to stand trial destroyed by Jail conditions.
6. Non-Disclosure of material evidence (Henry Statements) Violation of the Court's Discovery order (furnishing the statements, rap sheets, Conway, and other Brady Material)
7. Suppression of material evidence—through Non-Disclosure.
8. A Competency Hearing should have been ordered—Due to the Defendant's statements of suffering a degree of insanity, and the Defense Counsel's statements that the Defendant should see a specialist of some sort.
9. Illegal search of the Wailes Avenue
10. Illegal sentence when sentenced as a special offender without due process.

PERJURED TESTIMONY

The Government used perjured testimony from an excellmate, Joseph D. Sadler, who called the FBI 'In relation to his case,' not as his public spirited duty. Before Sadler called the FBI he discussed the conspiracy with one of his friends in the jail cell, other than the Plaintiff. This sworn statement was taken after the Plaintiff's trial.

SUBSCRIBED AND SWORN TO UNDER OATH by JOSEPH RAY CONWAY

April 13, 1973

"I met Mr. Sadler at the Norfolk City Jail, and got very close as a friend. We were in the same cell as Bill (Billy Gale Henry), and we talked together quite a lot. One night, Mr. Sadler told me he couldn't

stand going back to prison. I asked him how he could keep from going, he told me that he would tell the FBI that Henry robbed the United Virginia Bank of Janaf Shopping Center. I said, 'but Billy has never admitted robbing no kind of bank.' Sadler said, 'I know, he never admitted it, but I'll tell this to the FBI and they'll keep me from going to prison.' I said, 'That is a hell of a way to keep from going back,' and he said, 'I have a lot to look forward to on the street, and I will do anything to get back out there.'"

At the trial Sadler testified to and repeated statements of conversations made by Henry allegedly implicating himself (Henry) in the bank robbery. On cross-Examination Sadler didn't know "what city the bank was in, (Sadler saying Virginia Beach, Virginia; in contrast to Norfolk, Virginia) (TR 141) Sadler didn't know how many robbers were involved, or how the robbery was carried out; in confusion Sadler told a 'Fairy tale' about a woman driving the car, and a robber standing on the sidewalk outside the bank. A description of a robbery which didn't fit the facts of the case, as a private citizen had witnessed the robbery from only a few feet and described only three men involved—and this witness who did not have an ulterior motive to fabricate, said Henry didn't look like anyone he could identify.

At TR. 143 when Sadler was asked if he received any promises for his testimony, he said, "No."

Q. How did you contact the FBI with this testimony?"

A. "How did I contact the FBI? I called the FBI Agents."

Q. "You did this —"

A. "Yes Sir."

Q. "As your public spirited duty?"

A. "In relation to my case.

"It was through the advise of my attorney."

Q. "Who is your attorney?"

A. "Mr. Abraham."

When the Plaintiff contacted Mr. Abraham, Attorney Abraham stated in a letter to the Plaintiff, ". . . I do not recall having discussed you with Mr. Sadler. On checking my file I find no mention of you whatsoever."

Sadler was not a federal prisoner—Sadler faced more than 20 charges in the Commonwealth of Virginia, but no federal charges.

"In relation to his case," can only mean he wants to make a deal.

"It was through the advice of his attorney," is a lie. Mr. Abraham would have made a note of any advise such as testifying in Federal court.

The Plaintiff states under oath of this petition that he did not tell Sadler that he (Henry) robbed a bank. The testimony by Joseph D. Sadler is perjured testimony by a material witness.

> *Napue* v. *Illinois*, 360 U.S. 264
> *Giglio* v. *United States*, 405 U.S. 150
> *Moore* v. *Illinois*, 408 U.S. 798

Sadler's testimony was material—this was the only evidence linking the Plaintiff to the scene of the crime, or in the presence of the other suspects in the case. Sadler bargained with the FBI and received rewards for his services rendered.

KNOWING USE OF PERJURED TESTIMONY—

Material Value

The FBI is a professional investigative agency—from their interviews with Sadler they would have known, or should have known, that it was a fabrication of a "Fairy Tale" by a desparate person wanting out of jail.

—FACTS OF THE CASE—

Sadler didn't know the facts of the case: if Sadler had alleged that four people were at the scene of the crime, that a man stood by the door of the bank during the robbery, that a woman drove the car; they would not

have believe Sadler, unless they chose to 'ignore the false information.' And allow the false testimony to be presented.

The transferring of Henry (Plaintiff) and Conway away from the Agent/Informer Sadler; was to hide the existence of Sadler. The separation of Conway and Henry was to hide Conway from Henry.

JOSEPH RAY CONWAY

Conway was a trustee in the Norfolk City Jail who was painting the entire inside of the jail. He had been there for approximately one year, he faced other charges in the Virginia courts: The transferring of Conway was to facilitate the Federal Authorities. Sadler told the FBI something, or some sort of story to prompt them to transfer Conway.

Even the jailers were not aware of the conspiracy against Henry—the deception and hiding of witnesses was an ulterior motive to expose Henry to an unfair trial. The government knowing used perjury.

> *Miller* v. *Pate*, 386 U.S. 1 (1967) "If the Government knows that a piece of evidence is false or that a witness is perjuring himself or is unreliable, it has a duty not to use such evidence in order to gain a conviction."

The FBI knew that Sadler gave false testimony, the Government's attorney too; it was their duty not to use this unreliable person.

> *Napue* v. *Illinois*, 360 U.S. 264 ". . . the same result obtains when the (Government) though not soliciting false evidence, allows it to go uncorrected when it appears."

Plaintiff submits the Motion to Vacate the sentence should be granted.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORFOLK

Norfolk, Virginia 23510

CHAMBERS OF
RICHARD B. KELLAM
CHIEF JUDGE

August 30, 1977

Roger T. Williams, Esquire
Assistant U.S. Attorney
P.O. Box 60
Norfolk, Virginia 23501

Re: Billy Gale Henry v. United States
Civil Action No. 75-453-N
(Cr. #243-72-N)

Dear Roger:

The Fourth Circuit remanded the above case for determination of the issue of information allegedly furnished by informers for the FBI, who allegedly were cellmates of Henry.

Earlier, I issued an order directing the parties to furnish affidavits to establish any facts they thought pertinent. I believe I can dispose of this matter without the necessity of a public hearing.

It is, therefore, requested that you furnish affidavits of the FBI agents involved in this investigation as to whether or not the alleged cellmates of Henry were employed by the FBI to question him or obtain information for them. The affidavit should also deal with the issue of whether the agents in any way sought to have Henry jailed, either at Norfolk or Portsmouth, and whether they took any part in attempting to have the alleged cellmates transferred from one jail to another. A reading of the complaint would clearly point out the issues which he raised. I believe the cellmates were Sadler and Nichols. I would appreciate it if you would

arrange to have these affidavits filed, with copies to plaintiff, within 10 days.

If, by chance, the agents did request Sadler or Nichols to interview Henry, we probably will have to grant a hearing.

Thanking you, I am

Very truly yours,

/s/ Richard B. Kellam
RICHARD B. KELLAM
United States District Judge

RBK/aw
Dictated by Judge Kellam,
signed in his absence.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 75-453-N

(CR. # 243-72-N)

BILLY GALE HENRY, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

AFFIDAVIT

I, Nicholas V. O'Hara, being duly sworn, depose and say as follows:

(1) I am a Special Agent (SA) of the Federal Bureau of Investigations (FBI), assigned in a supervisory capacity to the Planning and Inspection Division, Federal Bureau of Investigation Headquarters (FBIHQ), Washington, D.C. I was formerly assigned to the Norfolk Virginia, Division of the FBI and am aware of the issues being raised by plaintiff in this matter. I participated in the investigation of the bank robbery of the United Virginia Bank/Seaboard National, Janaf Office, Norfolk, Virginia, which occurred August 28, 1972, in which plaintiff was identified as a participant.

(2) I am aware that SA Gerald T. Coughlin obtained information from an informant which directly related to the participation of Billy Gale Henry in the bank robbery of August 28, 1972, mentioned above. To my knowledge, this informant was not directed at any time to solicit information from Mr. Henry either by myself or SA Coughlin. Due to the fact that this investigation was assigned to me, SA Coughlin and I closely coordinated each aspect of the case relating to the informant to insure all information obtained was done so with due regard for all legal considerations.

(3) On February 28, 1973, I interviewed Joseph D. Sadler at the Norfolk, Virginia, City Jail. Mr. Sadler furnished information to me which had been volunteered to him by Mr. Henry. At no time did I direct Mr. Sadler to seek out Mr. Henry and obtain information for myself or the FBI in connection with any criminal activity of Mr. Henry.

(4) I did not contact any Norfolk or Portsmouth, Virginia, jail authorities to arrange for any particular cellmate to be placed with Mr. Henry or to arrange transfers for Mr. Henry. All such accommodations are handled by the United States Marshals Office, and I did not make any such contact with any member of the U.S. Marshals Office in that regard.

/s/ Nicholas V. O'Hara
NICHOLAS V. O'HARA
Special Agent
Federal Bureau of Investigation
Washington, D.C.

Subscribed and Sworn to before me this 7th day of September, 1977.

/s/ Illegible
Notary Public

My commission expires September 14, 1981

SUPREME COURT OF THE UNITED STATES

No. 79-121

UNITED STATES, PETITIONER,

v.

BILLY GALE HENRY

ORDER ALLOWING CERTIORARI

Filed October 1, 1979

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 305244 123

Supreme Court, U.S.
FILED
AUG 8 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE

UNITED STATES

No. 79-121

UNITED STATES OF AMERICA,
Petitioner,

vs.

BILLY GALE HENRY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Michael E. Geltner

Larry J. Ritchie

Attorneys for Respondent

Georgetown University Law Center
Appellate Litigation Clinic
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
Tele: (202) 624-8296

TABLE OF CONTENTS

PAGE

Table of Authorities.....ii

Question Presented.....1

Statement of the Case.....2

Reasons Why the Writ should be Denied.....3

Conclusion.....7

Certificate of Service.....7

TABLE OF AUTHORITIES

PAGE

Beatty v. United States, 389 U.S. 45 (1967), reversing United States v. Beatty, 377 F.2nd 181 (5th Cir. 1967).....4

Brewer v. Williams, 430 U.S. 387 (1977).....4

Massiah v. United States, 377 U.S. 201 (1964).....3

United States ex rel. Baldwin v. Yeager, 428 F.2nd 182 (3rd Cir. 1970).....6

Wilson v. Henderson, 584 F.2nd 1185 (2nd Cir. 1978).....6

QUESTION PRESENTED

Whether Henry's Sixth Amendment right to counsel was violated when, after he was indicted and jailed for bank robbery, an F.B.I. agent caused a paid informant to gain Henry's confidence in jail to obtain admissions, the informant engaged Henry in conversations to that end and the informant testified at trial that Henry had told him of casing the bank and renting a hideout and had described the bank robbery to him.

STATEMENT OF THE CASE

The case is accurately and adequately stated in Judge Winter's opinion for the court of appeals. The government's summary of the evidence must be supplemented in the following respects. Although two armed, masked men entered the bank, so far three people have been convicted of the bank robbery on the theory they were in the bank. John Luck and Johnny Moore were convicted before Henry went to trial. The testimony against Henry, other than that challenged in the motion to vacate, was wholly circumstantial. Only one witness, John Peterson, testified to seeing the robbers unmasked.[1/] Peterson, who was 200 feet from the bank, saw the two robbers come out and get in a car. He identified Moore as one of the two robbers. He could not identify the other, taller man as Luck, nor did he say it was Henry. He said Henry was not the third man in the car and he could not say Luck was. Fingerprints were lifted near where the taller robber assaulted a teller and not identified as Henry's.[2/]

At trial, the prosecutor hinged a weak case on two informants, Edward Nichols and Joseph Sadler, both of whom claimed Henry had made admissions to them in jail. Nichols testified that Henry had told him of casing the bank and renting the hideout and had described the bank robbery.[3/] Sadler said Henry had told of a bank robbery in which Henry and "Lucky or Luck" went in the bank, another stood outside and a woman[4/] was in the getaway car.[5/]

---

1 / The key part of Peterson's testimony is at tr. March 7, 1973, pp.48-53.

2 / tr. Mar. 7, 1973, p.66.

3 / tr. Mar. 7, 1973, pp.136-139. Nichols' testimony is attached as Exh. I.

4 / This was contradicted by Peterson. tr. Mar. 7, 1973, p.49.

5 / Henry's §2255 claim that Sadler's testimony was tainted, still unresolved, will be described infra.

District Judge Kellam's recital of the facts in his October, 1977 opinion is inconsistant with this description of the trial evidence (30a, 40a), but the court of appeals properly concluded that his "recollection of the evidence was inaccurate." (9a) (Butzner, C.J., concurring)

REASONS WHY THE WRIT SHOULD BE DENIED

If the court is seriously considering overruling Massiah v. United States, 377 U.S. 201 (1964), this case is as good a vehicle as any other in which to do it. In all other respects, it has no place here, and the reasons urged by the government for granting the writ do not hold up.

1. Massiah. In all significant respects, this case is the same as Massiah. The informant sought to procure admissions from Massiah not by formal questioning or trick, but by engaging him in conversation which led Massiah to make admissions. This strategem led to a tape recording, but, at Massiah's trial, testimony was permitted only about Massiah's part of the conversation, not the informant's.[6] Neither the court of appeals nor this court considered the words used by the informant to be significant; this court held federal agents could not deliberately elicit incriminating statements after indictment for use in the pending case in the absence of counsel. 377 U.S. at 206.

Although not filled out, the record in this case demonstrates this was not one in which the informant, even if so instructed, passively waited to overhear admissions by Henry to others. As concurring Judge Butzner pointed out, Nichols had " 'some conversations' with [Henry], but he did not divulge [in court] what he said to [Henry]."[7] 8a.

That the decision of the court of appeals is squarely within the rule of Massiah is conclusively demonstrated by Judge Winter's careful analysis of the post-Massiah precedents, 5a-7a, particularly Beatty v. United States, 389 U.S. 45 (1967), reversing United States v. Beatty, 377 F.2nd 181 (5th Cir. 1967). In the final analysis, the government's argument comes to the proposition, urged below[8] and renewed here,[9] that Brewer v. Williams, 430 U.S. 387 (1977) somehow narrowed Massiah. Professor Kamisar has said of that proposition, "I think [the author of both Massiah and Williams] would be startled to learn that, although when he authored the Williams opinion he evidently thought he was revivifying and expanding Massiah, he was actually restricting its scope..."[10]

2. The Court of Appeals. The choice facing the court of appeals was not reversal or affirmance, but reversal or remand. In choosing the former, it not only decided the case correctly under this court's precedents, but also displayed great common sense in view of the history of this litigation.

At trial, Nichols did not disclose that he was a jail plant, and his testimony was a "surprise" to the defense (tr. Mar. 7, 1973, p.137), because, though the prosecutor had agreed, before trial, to furnish statements of the accused, none were disclosed.

---

6 / See United States v. Massiah, 307 F.2nd 62, 65 (2nd Cir. 1962).

7 / The trial record bears out Judge Butzner. Nichols testified he had "some conversations" with Henry. tr. Mar. 7, 1973, p.134. He testified he "related the product of this conversation to an F.B.I. agent," tr. Mar. 7, 1973, pp.134-135, and said Henry told him about the bank robbery, tr. Mar.7, 1973, p.135 (Did Mr. Henry tell you anything about that bank robbery? Yes sir.) and that Henry gave a reason for going in the bank, tr. Mar. 7, 1973, p.136 (Did he give you any reason for going in the Janaf Bank?) It was not until after trial that Nichols' "jail plant" status surfaced, but, even without searching questioning at trial, the foregoing testimony paints him as drawing Henry out.

8 / Appellee's Brief in court of appeals, pp.6-8.

9 / Petition 10-11.

10/ Y.Kamisar, Brewer v. Williams, Massiah and Miranda: What is "interrogation"? When does it matter? 67 Georgetown L.J. 1, 42, n.283 (1978).

Two years after trial, Henry became aware of Nichols' informer status and raised the Massiah claim in his motion to vacate, together with the claim that Sadler's testimony was perjury and known to be so by the F.B.I., to whom Sadler had come in an effort to help himself. On August 28, 1975, Judge Kellam dismissed the motion without hearing. Henry's appeal to the Fourth Circuit produced a remand (53a) on March 29, 1977 instructing Judge Kellam to conduct an evidentiary inquiry(55a)or evidentiary hearing (56a) on the Nichols and Sadler points. Rather than do so, Judge Kellam wrote the prosecutor, seeking F.B.I. agent affidavits so he could "dispose of the matter without the necessity of a public hearing."[11/] Getting the affidavits, Judge Kellam again dismissed without hearing on October 11, 1977, in an opinion which, in several major respects, was factually inaccurate.[12/]

Henry's appeal from the second dismissal came before the court of appeals for argument in October, 1978, over five years after trial and still with no developed record, because the district judge did not follow the court of appeals' directions to hold an "evidentiary inquiry or hearing". Faced with this history and an adequate record under Massiah, the court of appeals would have acted cruelly and unreasonably to send Henry on the merry-go-round again, so it decided the case on the trial record and F.B.I. affidavits instead of remanding again.[13/] Affirmance of the district judge was not one of the court of appeals' choices and is not a choice here.

11/ Letter of 8/30/77, Judge Kellam to Roger T. Williams, Ass't U.S. Attorney, in record below.

12/ See 9a.

13/ Deciding for Henry on the Nichols point, it never had to reach the Sadler issue, which could not have been decided without remand and would still require hearing if the court of appeals' opinion is not sustained.

3. Wilson v. Henderson. The government makes much of the conflict with the Second Circuit decision in Wilson, 584 F.2nd 1185 (2nd Cir. 1978). As a precedent, Wilson is overstated. Decided by two visiting district judge's over the dissent of Judge Oakes and over four votes for en banc reconsideration (590 F.2nd 408) by a court notoriously wary of en banc consideration, Wilson is a poor precedent, recently demonstrated to be inconsistent with Massiah.[14/] It is unfortunate that the Wilson petition in this Court was out of time, but that is no reason to grant certiorari to the next case raising the same issue, but which is correctly decided.

4. Nichols Not The Government? For the first time, the government tries to change Nichols' status from "jail plant" to a prisoner who suddenly finds information and seeks to help himself with it. Petition, p.13. The point is new here, and inconsistent with the record. Courts have clearly and consistently held that the applicability of Massiah turns on whether, on the one hand, the informer was sent in to obtain information and, on the other, whether he first sought out the government after he got it. See United States ex rel. Baldwin v. Yeager, 428 F.2nd 182 (3rd Cir. 1970). Under Agent Coughlin's affidavit (57a), Nichols was in the former category.

14/ See Kamisar, supra n.10 at p.42, n.283.

CONCLUSION

The petition should be denied.

Respectfully Submitted,

Michael E. Geltner

Larry J. Ritchie

Attorneys for Respondent

Georgetown University Law Center
Appellate Litigation Clinic
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
Tele: (202) 624-8296

CERTIFICATE OF SERVICE

I hereby certify that a copy of the attached Respondent's Brief in Opposition to Petition for a Writ of Certiorari was mailed on August 8, 1979 to:

Wade H. McCree, Jr.
Solicitor General
Department of Justice
Washington, D. C. 20350

Michael E. Geltner

EDWARD BENJAMIN NICHOLS,

a witness called by and in behalf of the government, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Sims:

Q State your name, please, sir.

A Edward Benjamin Nichols.

Q Mr. Nichols, do you know Billy Gale Henry?

A Yes; I do.

Q Do you see him here in the courtroom today?

A Yes, sir.

Q Where is he located?

A Sitting right there.

Q Okay.

MR. SIMS: Let the record reflect the witness has identified Mr. Henry.

THE COURT: The record will so show.

By Mr. Sims:

Q Where did you meet Mr. Henry?

A At the Norfolk City Jail.

Q Did you have an opportunity to have some conversations with Mr. Henry while he was in the jail?

A Yes, sir.

Q Did there come a time when you related the product of this conversation to an FBI agent?

A Yes, sir.

Q Did you relate that to the FBI agent before or after Mr. Henry gave you information?

A After.

Q Did the FBI --

What is the FBI agent's name?

A Jerry Coughlin.

Q Did he have you ask specific questions of Mr. Henry?

A No, sir.

Q Did he tell you anything about the bank robbery at the Janaf Branch of the United Virginia Bank on the 28th of August 1972?

A No, sir.

Q Did Mr. Henry tell you anything about that bank robbery?

A Yes, sir.

Q Would you relate to the jury what he told you?

A That he had been in the bank; that he had been in the bank that he was accused of; that he had been in the bank several times; that he had exchanged money several times, and he -- and one time, one particular time, that he tried --

THE REPORTER: Say it again, please.

THE WITNESS: One particular time he tried and --

THE COURT: One time he -- what?

THE WITNESS: The bank had closed, and he tried, and he was refused admission to the bank because it was closed, and he turned and walked away.

THE COURT: Speak up just a little louder, too, if you will, please, so all the jury can hear you.

By Mr. Sims:

Q Did he tell you --

MR. RABINOWITZ: If your Honor please --

I'll wait for cross-examination.

THE COURT: All right.

MR. RABINOWITZ: I think up to now --

By Mr. Sims:

Q Did he --

MR. RABINOWITZ: I'll let it go on.

By Mr. Sims:

Q Did he give you any reason for going in the Janaf Bank?

A I believe he said he wanted to see who opened the vault.

Q Okay.

Did he describe to you how a bank robbery occurred?

MR. RABINOWITZ: If your Honor please, he is leading his witness now.

MR. SIMS: Okay. I'll rephrase the question.

MR. RABINOWITZ: This is his witness, if your Honor please, --

THE COURT: Well, --

MR. RABINOWITZ: -- and from jail --

THE COURT: -- I suppose --

MR. RABINOWITZ: -- he is asking him what he said, and now he's leading him into specific --

He's trying to get something from him I don't know what it is. I've never --

The witness is a surprise to me.

THE COURT: All right. Suppose you try to rephrase it, although I don't believe that's leading, but he can rephrase the question.

Did he tell you anything about any bank robbery there?

THE WITNESS: Yes, sir.

THE COURT: All right.

What did he tell you?

By Mr. Sims:

Q What did he tell you, sir?

A He said that people were -- several people went into the bank, about showing guns, and a bank teller was hit.

Q Did he say anything about being removed from the bank?

A No. No; he didn't.

Q Did he mention anything to you about a rent receipt found --

A Yes, sir; he did.

Q Would you relate that, please?

A He said -- he told me -- that the only thing to connect him to the bank was a rent receipt of a house he had rented.

Q Have you previously been convicted of a felony?

A Yes.

MR. SIMS: That's all the questions I have.

CROSS-EXAMINATION

By Mr. Rabinowitz:

Q You are a convicted felon?

A Yes.
Q And you were in jail with Mr. Henry?
A Yes.
Q And now you're free?
A Yes.
Q Now, what Mr. Henry related to you was that he was telling you about a rent receipt and telling you about the charges against him, was he not?
A He was.
Q Isn't that it?
A He mentioned the rent receipt and he said he was in the jail for bank robbery.
Q He was telling you basically about what charges were against him, wasn't he?
A He mentioned it.
Q And that's what it was all about?
A Yes, sir.
MR. RABINOWITZ: That's all I have.
THE COURT: All right, sir.
Gentlemen, may he be excused?
MR. SIMS: No further questions.
THE COURT: Fine. Thank you very much. You are excused.
MR. SIMS: At this time, Judge, I would like to call Joseph D. Sadler.

Supreme Court, U.S.
FILED
DEC 3 1979
MICHAEL RODAK, JR., CLERK

No. 79-121

In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, PETITIONER

v.

BILLY GALE HENRY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

DAVID B. SMITH
Attorney
Department of Justice
Washington, D.C. 20530

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Constitutional provision involved	2
Statement	2
Summary of argument	14
Argument	
I. No Sixth Amendment violation results from mere association or general conversation between a defendant and an informant	20
A. A Sixth Amendment violation does not occur unless the government has caused the accused to be questioned about the offense	20
B. The policies of the Sixth Amendment do not support an extension of *Massiah* and *Brewer* to bar the admission of statements made to an informant who did not interrogate the accused or otherwise elicit the statements	27
1. The Court has generally recognized the Sixth Amendment right to the assistance of counsel in the context of "trial-like confrontations" between the government and the accused in which the accused is confronted with complex legal proceedings or an expert adversary	28

Argument—Continued Page

2. Sixth Amendment policies do not support a broad expansion of the *Massiah* exclusionary rule 32

3. The general rule that no Sixth Amendment violation occurs in the absence of interrogation applies in the jail setting..... 40

II. Even if the informant had violated his instructions from the FBI agent not to question respondent about his offense, this questioning would not have constituted government interrogation 45

Conclusion 51

CITATIONS

Cases:

Argersinger v. *Hamlin*, 407 U.S. 25..... 28
Beatty v. *United States*, 389 U.S. 45..... 11, 26
Beckwith v. *United States*, 425 U.S. 341.. 34, 41
Bell v. *Wolfish*, No. 77-1829 (May 14, 1979) 40
Brewer v. *Williams*, 430 U.S. 387 .....*passim*
Burdeau v. *McDowell*, 256 U.S. 465 48
Coleman v. *Alabama*, 399 U.S. 1 ..... 29, 30
Corngold v. *United States*, 367 F.2d 1.... 49, 50
Edelman v. *Jordan*, 415 U.S. 651 26
Escobedo v. *Illinois*, 378 U.S. 478 .....25, 33, 34
Fare v. *Michael C.*, No. 78-334 (June 20, 1979) 28
Faretta v. *California*, 422 U.S. 806 31
Flagg Bros. v. *Brooks*, 436 U.S. 149..... 48
Gerstein v. *Pugh*, 420 U.S. 103 30

Cases—Continued Page

Gideon v. *Wainwright*, 372 U.S. 335..... 28
Gilbert v. *California*, 388 U.S. 263 31
Hamilton v. *Alabama*, 368 U.S. 52 29
Hampton v. *United States*, 425 U.S. 484.. 37
Hoffa v. *United States*, 385 U.S. 293..... 37
Jackson v. *Metropolitan Edison Co.*, 419 U.S. 345 48
Johnson v. *Zerbst*, 304 U.S. 458 28
Kirby v. *Illinois*, 406 U.S. 682 26
Lanza v. *New York*, 370 U.S. 139 41
Massiah v. *United States*, 377 U.S. 201..9, 10, 15, 23, 24, 25, 32, 33, 37
McLeod v. *Ohio*, 381 U.S. 356 ..... 11, 26
Mempa v. *Rhay*, 389 U.S. 128 30
Michigan v. *DeFillippo*, No. 77-1680 (June 25, 1979) 47
Michigan v. *Tucker*, 417 U.S. 433 26
Miller v. *California*, 392 U.S. 616 ..... 40, 43
Milton v. *Wainwright*, 407 U.S. 371 42
Miranda v. *Arizona*, 384 U.S. 436 ..... 34, 41
Moore v. *Illinois*, 434 U.S. 220 ..... 28, 30
Moose Lodge v. *Irvis*, 407 U.S. 163 48
Oregon v. *Mathiason*, 429 U.S. 492 34
Parker v. *Randolph*, No. 78-99 (May 29, 1979) 26
People v. *Cardona*, 41 N.Y.2d 333, 360 N.E.2d 1306, 392 N.Y.S.2d 606 46
Powell v. *Alabama*, 287 U.S. 45 ..... 28, 31
Reitman v. *Mulkey*, 387 U.S. 369 48
Rochin v. *California*, 342 U.S. 165 37
Schmerber v. *California*, 384 U.S. 757.... 31
Schneckloth v. *Bustamonte*, 412 U.S. 218.. 30
Scott v. *Illinois*, 440 U.S. 367 31
Sherman v. *United States*, 356 U.S. 369.. 50
Spano v. *New York*, 360 U.S. 315 ..... 24, 35

Cases—Continued — Page

State v. *Ferrari*, 112 Ariz. 324, 541 P.2d 921 49
State v. *McLeod*, 1 Ohio St. 2d 60, 203 N.E.2d 349 26
State v. *Smith*, 107 Ariz. 100, 482 P.2d 863 49
United States v. *Aloisio*, 440 F.2d 705, cert. denied, 404 U.S. 824 49
United States v. *Ash*, 413 U.S. 300..... 28, 29, 35, 37
United States v. *Barfield*, 461 F.2d 661.... 41
United States v. *Clegg*, 509 F.2d 605..... 49
United States v. *Hayles*, 471 F.2d 788, cert. denied, 411 U.S. 969 44
United States v. *Hearst*, 563 F.2d 1331, cert. denied, 435 U.S. 1000 ..... 41, 44
United States v. *Janis*, 428 U.S. 433..... 48
United States v. *Luciow*, 518 F.2d 298.... 49
United States v. *Massiah*, 307 F.2d 62..... 23, 25
United States v. *Mekjian*, 505 F.2d 1320.. 49
United States v. *Rodriguez*, 596 F.2d 169.. 49
United States v. *Russell*, 411 U.S. 423..... 37
United States v. *Stonehill*, 274 F. Supp. 420, aff'd, 405 F.2d 738, cert. denied, 395 U.S. 960 49
United States v. *Valen*, 479 F.2d 467, cert. denied, 419 U.S. 901 ..... 49, 50
United States v. *Wade*, 388 U.S. 218..... 30
United States v. *Washington*, 431 U.S. 181 22
United States v. *Wedelstedt*, 589 F.2d 339, cert. denied, No. 78-1383 (June 4, 1979) 49
United States v. *White*, 401 U.S. 745..... 37, 39

Cases—Continued — Page

United States ex rel. Milani v. *Pate*, 425 F.2d 6, cert. denied, 400 U.S. 867..... 50
Watts v. *Indiana*, 338 U.S. 49 32
Weatherford v. *Bursey*, 429 U.S. 545..... 26, 44
White v. *Maryland*, 373 U.S. 59 29
Wilson v. *Henderson*, 584 F.2d 1185, cert. denied, No. 78-6610 (June 18, 1979) 43, 51

Constitution, statutes and rule:

United States Constitution:
Fourth Amendment 48
Fifth Amendment 17, 34, 35, 36, 37,39, 40
Sixth Amendment .....*passim*
Fourteenth Amendment 48

18 U.S.C. 2113(a) 3
18 U.S.C. 2113(d) 3
28 U.S.C. 2255 .....6, 10, 14
Fed. R. Crim. P. 12 12

Miscellaneous:

Developments in the Law—Confessions, 79 Harv. L. Rev. 938 (1966) 26
Dix, *Undercover Investigations and Police Rulemaking*, 53 Tex. L. Rev. 203 (1975) 41
Enker & Elsen, *Counsel for the Suspect: Massiah* v. *United States and Escobedo* v. *Illinois*, 49 Minn. L. Rev. 47 (1964).. 32, 33, 34, 37
Funk & Wagnalls New Standard Dictionary (1946) 24

Miscellaneous—Continued Page

Grano, *Rhode Island* v. *Innis: A Need to Reconsider the Constitutional Premises Underlying the Law of Confessions*, 17 Am. Crim. L. Rev. 1 (1979) ..32, 33, 36, 37, 38
Kamisar, *Brewer* v. *Williams, Massiah, and Miranda: What Is "Interrogation"? When Does It Matter?*, 67 Geo. L.J. 1 (1978) 35-36
3 Murray, *A New English Dictionary* (1897 ed.) 24
Restatement (Second) of Agency (1958) .. 47
Webster's New International Dictionary (2d ed. 1953) 24
Webster's New International Dictionary (3d ed. 1961) 21, 24

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-121

UNITED STATES OF AMERICA, PETITIONER

v.

BILLY GALE HENRY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 590 F.2d 544. The memorandum order of the district court (Pet. App. 27a-51a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 25a) was entered on December 26, 1978. The government's petition for rehearing was denied on March 30, 1979 (Pet. App. 26a). On June 14, 1979, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including July 28,

1979. The petition was filed on July 25, 1979, and was granted on October 1, 1979 (A. 86). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether respondent's Sixth Amendment right to assistance of counsel was violated by the admission of statements he made in the course of general conversation with a cellmate who had agreed to act as a government informant but who had been instructed not to question respondent.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

STATEMENT

1. On August 28, 1972, the Janaf Branch of the United Virginia Bank/Seaboard National was robbed at gunpoint by two masked men who entered shortly after opening, as the bank's employees were processing the night deposits (A. 12-14, 16-17;

Tr. 10-12, 35-36). Respondent was indicted on charges of armed robbery of the bank, 18 U.S.C. 2113(a) and (d), and was incarcerated prior to trial in the Norfolk City Jail.

Shortly thereafter Gerald Coughlin, an FBI agent who participated in the investigation of the Janaf bank robbery, contacted Edward Nichols (Pet. App. 57a). At that time, Nichols, who had previously acted as a paid FBI informant, was incarcerated in the Norfolk City Jail on local forgery charges (*id.* at 57a-58a). Nichols informed Coughlin that he was being held in the same cell block with various federal prisoners who were awaiting trial, including respondent (*id.* at 58a).[1] Agent Coughlin asked Nichols to be alert to any statements made by these persons about the charges against them, but he specifically instructed Nichols not to initiate conversation with or question them regarding the charges against them (*id.* at 58a, 60a). Nichols later informed agent Coughlin that respondent had engaged him in conversation, during the course of which respondent had described how the bank robbery had occurred and sought Nichols' assistance in making contact with some people outside of the jail when Nichols was released (*id.* at 58a-59a). The FBI paid Nichols for furnishing this information (*id.* at 59a).

---

[1] Nothing in the record indicates that Coughlin contacted Nichols in order to gain evidence about respondent's involvement in the Janaf bank robbery. To the contrary, Coughlin's statement suggests that he was not aware that respondent and Nichols were in the same cellblock until Nichols informed him of this fact (see Pet. App. 58a-59a).

2. Respondent was tried before a jury in the Norfolk Division of the United States District Court for the Eastern District of Virginia. Several bank employees described the robbery, which was carried out by two men wearing green overalls, sneakers, and masks (A. 12-17; Tr. 10-12, 26-28, 35-40). One employee observed the robbers drive away in a tan Ford automobile with Virginia license BBL-373 (Tr. 38-39) and also observed a third man who had been waiting in the automobile (Tr. 40). The bank employees could not identify the men who entered the bank because they were wearing masks (Tr. 10). An employee of a nearby business also testified that he observed the third man in the car. This witness had previously identified one of the two men who had been in the bank as someone other than respondent (A. 18-19; Tr. 47-49), but he could not describe the other man who had been in the bank (A. 19-20; Tr. 50).

An FBI agent testified that about an hour after the robbery, agents searching the area near the bank discovered the getaway car, which had been left illegally parked, with the doors ajar (Tr. 72-74). When the agents searched the car, they discovered a rent receipt indicating money received from one Allen R. Norris and a lease for a house on Wailes Avenue in Norfolk (Tr. 74-76). Shortly thereafter, two men subsequently convicted of participating in the robbery were arrested at the rented house, where agents also discovered the proceeds of the robbery, as well as the guns and masks the robbers had employed (Tr.

78-82). Other witnesses testified that respondent had rented the house on Wailes Avenue under the assumed name of Allen R. Norris, that his palm print was identified on the copy of the lease agreement found in the getaway car, that respondent had been seen at the rented house before the robbery with another man, identified as John Luck (one of the two men previously convicted of participation in the robbery), and that respondent, again under an assumed name, had ordered parts for a police radio scanner found at the rented house (A. 37-48; Tr. 154-159, 167, 169-170, 177-181, 182-185, 190-192, 196).

Nichols, the informant whom FBI agent Coughlin had contacted at the Norfolk City Jail, also testified at trial, without objection. He stated that respondent had said that he went to the Janaf bank several times before the robbery, on one occasion to see who opened the vault. Nichols also testified that respondent had described the robbery to him and had stated that the only thing the prosecution had connecting him to it was the rent receipt (A. 29, 30; Tr. 135-136, 138). Nichols testified that FBI agent Coughlin did not request him to ask respondent specific questions (A. 28-29; Tr. 135).

Joseph Sadler, who had also been respondent's cellmate, testified that respondent told him that he (along with a man named "Luck" or "Lucky," and another man whom he did not name) had robbed a bank and that he had hit one of the bank employees with a gun (A. 33; Tr. 142). Sadler stated that he had informed the FBI of respondent's statements on the

advice of his attorney in relation to his own case (A. 33-34; Tr. 143-144).

Respondent was convicted and sentenced to imprisonment for a term of 25 years (A. 50; Tr. 249). His conviction was affirmed by the court of appeals in a per curiam order, 483 F.2d 1401 (1973), and certiorari was denied, 421 U.S. 915 (1975).

3. On August 28, 1975, respondent moved to vacate his sentence pursuant to 28 U.S.C. 2255. Among other grounds for relief, respondent alleged for the first time that the introduction of Nichols' testimony violated his right to counsel.[2] Respondent alleged (A. 53, 56-57, 65; see also A. 75-76) that the FBI may have placed him in the same cell with Nichols and Sadler, that Nichols had "interrogated" him, that the FBI had sent Nichols to "question" him or "engage [him] in conversation" about the case, and that Nichols had come back to visit respondent at the Norfolk City Jail and later at the Portsmouth City Jail to ask him questions about the crime.

---

[2] Respondent's pro se petition (A. 51-71) also alleged that the government had knowingly permitted the introduction of perjured testimony by Joseph Sadler, violated the court's pretrial discovery order, made prejudicial statements in closing argument, and failed to disclose exculpatory material; the petition also alleged that respondent's counsel had not rendered effective assistance.

In an amended pro se complaint filed June 27, 1977 (A. 71-81), respondent renewed these allegations and further contended that his arrest warrant was not supported by probable cause, his right to counsel was violated when FBI agent O'Hara spoke with him in the Marshal's Office after his arrest, his competency to stand trial was destroyed by adverse jail conditions, a hearing should have been held on his competency to stand trial, the search of the Wailes Avenue residence was not supported by probable cause, and his sentence was illegal.

The district court denied the motion without a hearing. The court of appeals, in an unpublished order (Pet. App. 53a-56a), remanded the case for an "evidentiary inquiry" to determine, *inter alia*, whether Nichols was acting as a government agent during his jail cell conversations with respondent.

On remand, FBI agent Coughlin submitted an affidavit (Pet. App. 57a-60a) describing his relationship with Nichols. Coughlin stated (*id.* at 58a) that he had contacted Nichols on November 21, 1972, at the Norfolk City Jail. According to the affidavit, Nichols told Coughlin that he was in the same cellblock as respondent and a number of other federal prisoners awaiting trial. Coughlin stated that he recalled telling Nichols to be alert to any statements these individuals might make about the charges pending against them, but that he specifically told Nichols not to question respondent or the others about the charges against them. Coughlin also stated that Nichols was told not to initiate any conversations with respondent regarding the bank robbery charges, but that if respondent or the other federal inmates engaged him in conversation, he was to pay attention to their statements.

Coughlin contacted Nichols again on December 6, 1972, after Nichols had been released from the Norfolk City Jail. Nichols told Coughlin (Pet. App. 58a-59a) that respondent had engaged him in conversation while they were in jail together and had talked about the bank robbery charges against him. Nichols also said, according to the affidavit, that respondent had told him that he and his partner had been looking at the Janaf bank for some time and that respondent

described to Nichols how the robbery had occurred. Nichols also told Coughlin that respondent had requested Nichols to contact a woman named "Hink" after Nichols was released from jail because respondent wanted to use the woman as a go-between with his partner, who he said was in the Portsmouth City Jail. Finally, Nichols told Coughlin that respondent had asked him to obtain a handcuff key and floor plans to the Norfolk City Jail and the Marshal's Office because respondent wanted to break out of jail.[3]

Coughlin stated in the affidavit that Nichols made contact with the woman "Hink" on December 7. Nichols was paid by the FBI for the information he had furnished and for expenses and services in connection with respondent's requests (Pet. App. 59a). Coughlin also averred (*id.* at 59a-60a) that he had not requested that Nichols be placed in respondent's cell and had not interceded with jail officials on Nichols' behalf. He also stated (*id.* at 60a) that he never interviewed Joseph Sadler and never requested anyone at the Norfolk City Jail or Portsmouth City Jail to place Sadler and respondent in the same cell.

Nicholas O'Hara, the FBI agent in charge of the investigation of the bank robbery, also submitted an affidavit (A. 84-85). He stated that he was aware that agent Coughlin had obtained information from an informant (Nichols) but that, to his knowledge, this informant was not directed by either Coughlin or O'Hara to solicit information from respondent.

[3] Nichols did not testify at trial about respondent's request for assistance after Nichols was released from jail.

O'Hara also stated in his affidavit that Sadler, in an interview on February 28, 1973, in the Norfolk City Jail, had furnished him with information that respondent had "volunteered" to Sadler. O'Hara stressed that he did not direct Sadler to seek out and obtain information from respondent and that he did not contact the authorities at the Norfolk and Portsmouth City Jails to arrange for any particular person to be placed in a cell with respondent or to arrange for respondent's transfer while in custody. Nor, O'Hara said, had he made any contact on these matters with the United States Marshal's Office, which was responsible for arranging accommodations for federal prisoners.

The district court accepted the FBI agents' statements that they had not requested Nichols to question respondent or to engage him in conversation and had only asked Nichols to listen to statements respondent might make within his hearing and to report them. The court also noted (Pet. App. 38a, 39a) that Nichols had testified at trial that agent Coughlin had not requested that he ask questions of respondent (see A. 28-29; Tr. 135). Finally, the court found (Pet. App. 39a) that respondent's allegation that the FBI had something to do with where he was housed or with having Nichols placed in a cell with him was "clearly untrue."

On the basis of these factual findings, the district court concluded (Pet. App. 39a) that Nichols' testimony at trial did not violate respondent's Sixth Amendment right to counsel under this Court's decision in *Massiah* v. *United States*, 377 U.S. 201

(1964). The court noted that *Massiah* had held that a defendant's own incriminating words "which federal agents had deliberately elicited from him after he had been indicted and in the absence of counsel" could not be used against him (Pet. App. 39a n.5, quoting 377 U.S. at 206). But in this case, the court observed (*id.* at 39a), "the evidence clearly shows Nichols was not employed to question [respondent] or to seek information from him, but to merely report what he heard. There is no requirement an accused be furnished counsel when he wishes to shoot off his mouth."[4]

4. A divided panel of the court of appeals reversed and remanded with instructions that respondent be released from custody unless the government elects to retry him (Pet. App. 1a-24a). The majority opinion (*id.* at 5a) did not read the decision in *Massiah* to depend on a finding that any action by the informant, apart from his "mere presence," had induced the damaging remarks, although it did note (*id.* at 5a n.2) that the opinion of the court of appeals in *Massiah* indicated that the informant in that case had affirmatively solicited information about the

[4] The district court also concluded (Pet. App. 39a-40a) that, even assuming Nichols' testimony was subject to exclusion, respondent had not objected to the testimony at trial and could not raise an objection to the admission of this evidence in a Section 2255 proceeding. The court distinguished *Massiah*, which "dealt with the admissibility of evidence, objected to, on direct appeal and not a collateral attack on its admission" (*id.* at 39a n.5). The court also held that, in any event, admission of the testimony was harmless error.

charges pending against the accused. The majority opinion (Pet. App. 5a) also read this Court's summary reversals in *McLeod* v. *Ohio*, 381 U.S. 356 (1965), and *Beatty* v. *United States*, 389 U.S. 45 (1967), to stand for the proposition that the rule in *Massiah* applies to "all incriminating statements obtained by government agents after indictment and in the absence of counsel," not "only to those statements *induced* by such agents" (Pet. App. 5a; emphasis in original).

The majority opinion (Pet. App. 6a) also rejected the argument that the decision in *Brewer* v. *Williams*, 430 U.S. 387 (1977), had limited *Massiah* and its progeny to situations in which the government agent had directly questioned the accused about his participation in a crime. The majority found the term "interrogation," as used in *Brewer* v. *Williams*, to be a relative term not restricted to formalized questioning (Pet. App. 6a) and concluded (*id.* at 7a):

> If, by association, by general conversation, or both, [respondent] developed sufficient confidence in Nichols that [respondent] bared his incriminating secrets to an undisclosed paid informer, we think that there was interrogation within the meaning of *Brewer*. We hold therefore that [respondent's] right to counsel was violated when the government proved incriminating statements made to his cellmate after his indictment and in the absence of counsel.

Finding that the admission of Nichols' testimony could not be deemed harmless beyond a reasonable

doubt, the majority reversed the judgment of the district court (Pet. App. 7a-8a).[5]

Judge Butzner, who joined in the majority opinion, stated in a concurring opinion (Pet. App. 9a) that the critical issue was whether the informant had "elicited information" from respondent in the absence of counsel. "Proof of formal interrogation is unnecessary to invoke the protection of the sixth amendment. A conversation that is tantamount to interrogation is sufficient" (*ibid.*, *citing Brewer* v. *Williams*, *supra*, 430 U.S. at 397-401). He noted in this regard (Pet. App. 8a) that Nichols had admitted at trial that he had "some conversations" with respondent (See A. 28; Tr. 134) but did not divulge what he had said to respondent.

Judge Butzner indicated (Pet. App. 8a, 9a) that it would have been prudent for the district court to hold an evidentiary hearing, in view of respondent's claim that Nichols had questioned him about the case and the government's failure to reveal the substance of

[5] Neither the panel's opinion nor the concurring and dissenting opinions addressed the district court's ruling that respondent had waived this claim by his failure to object to Nichols' testimony at trial. On appeal, respondent contended (Reply Br. 4 & n.5) that no waiver of this objection occurred at trial because respondent was unaware of the critical fact that Nichols was a paid government informant, and thus lacked the information necessary to assert his *Massiah* claim. Because the court of appeals did not address the issue, and also because the trial antedated the 1975 amendments to Fed. R. Crim. P. 12, dealing with waiver of claims for exclusion of evidence, we have not presented the waiver issue for review by this Court.

Nichols' admitted conversations with respondent. But Judge Butzner did not urge a remand for such a hearing to determine whether a "conversation that is tantamount to interrogation" had taken place. Instead, he concluded (Pet. App. 9a) that, "absent testimony by the informant about what he said to [respondent], the judgment must be reversed because of the informant's admission that he had conversed with [respondent] and because of [respondent's] assertion that the conversation was a form of questioning."[6]

Judge Russell dissented (Pet. App. 10a-24a). He stated (*id.* at 10a) that *Massiah* and *Brewer* require "exclusion only when the challenged testimony is the result of 'interrogation.'" Quoting Justice Blackmun's dissenting opinion in *Brewer* v. *Williams*, *supra*, 430 U.S. at 440, Judge Russell concluded (Pet. App. 12a; emphasis in original) that neither an informant's presence alone nor his listening constitutes interrogation: "The mere 'subjective desire to obtain information from a suspect after arraignment,' if unaccompanied by some affirmative action, either direct or subtle, reasonably *calculated to induce conversation relative to the crime*, will not satisfy the requisite of 'interrogation.'" Since "[t]he record indicates that the [respondent's] incriminating statements

[6] Judge Butzner noted (Pet. App. 9a-10a) that the district court's harmless error ruling was founded on the mistaken belief that there had been an eyewitness identification of respondent as one of the bank robbers. We have not presented the fact-bound harmless error issue for review by this Court.

were voluntarily and spontaneously given without any encouragement from Nichols," Judge Russell found (Pet. App. 14a) that "there was no 'interrogation' of [respondent] by Nichols, however broadly that term may be defined." Moreover, *Brewer* established, in his view, that "whether the confession or damaging admission had been 'elicited surreptitiously' was 'constitutionally irrelevant'" (Pet. App. 15a, quoting 430 U.S. at 400).

The government's petition for rehearing with suggestion of rehearing en banc was denied, with three judges dissenting (Pet. App. 26a).

SUMMARY OF ARGUMENT

The decision by the court of appeals that evidence of respondent's incriminating admissions should have been excluded from his trial was not based on a finding that Nichols, the informant, had questioned respondent about the bank robbery or had otherwise affirmatively sought to induce him to make incriminating statements. There is nothing in the record, other than respondent's unsupported allegations in his original and amended motions under 28 U.S.C. 2255, showing such questioning or inducement. The court of appeals found a violation of respondent's Sixth Amendment rights solely on the basis of the possibility that respondent might have bared his incriminating secrets to Nichols because he developed confidence in Nichols as a result of association or general conversation with him in the jail.

The court of appeals' holding constitutes an extension of the Sixth Amendment right to counsel that is not supported by prior decisions of this Court or justified by the policies of the Sixth Amendment. Without endorsing the district court's choice of words, we submit that it was correct in concluding (Pet. App. 39a) that there is "no requirement an accused be furnished counsel when he wishes to shoot off his mouth."

I

A. In its most recent discussion of the Sixth Amendment issue, *Brewer* v. *Williams*, 430 U.S. 387 (1977), the Court made clear that the Sixth Amendment does not require the exclusion at trial of incriminating statements of the accused merely because he made the statements following a period of association with police officers while in custody or in the course of general conversation with those officers about matters unrelated to the charges against him. The Court found a Sixth Amendment violation in *Brewer* only because it concluded that the statements introduced at trial were the product of interrogation by a police detective, and the Court expressly stated (430 U.S. at 400) that there would have been no Sixth Amendment violation if there had been no interrogation.

The Court has applied the same rule with respect to the introduction at trial of statements made to a person the accused does not know to be an undercover police officer or informant. The Court's holding in *Massiah* v. *United States*, 377 U.S. 201 (1964), the

principal decision regarding the admissibility of post-indictment statements made to an informant, was dependent on the fact that the government had "deliberately elicited" incriminating statements from the accused by having the informant induce the accused to talk about the charges against him, not on the mere fact that the government placed itself in a position to overhear those statements.

B. Sixth Amendment policies and precedents do not justify the court of appeals' extension of *Massiah* and *Brewer* to require the exclusion of statements made by an accused without any interrogation or provocation by the government. In other areas, the Court has extended the right to counsel to pretrial judicial proceedings or other encounters between the accused and the government, characterized as "trial-type confrontations," at which the assistance of counsel is necessary to enable the accused to cope with unfamiliar legal proceedings or to counterbalance the expert professional prosecutor. In these situations, counsel is an advocate before the prosecutor and the court in situations that advance the case toward disposition, and counsel's presence is required to ensure that the accused does not forfeit procedural rights and to ensure the integrity of the truthfinding process.

The reasons for basing the *Massiah* exclusionary rule upon the Sixth Amendment right to counsel were not fully explicated in the opinion in that case. In fact, the *Massiah* rule appears to represent something of a departure from the main thrust of Sixth

Amendment jurisprudence. Unlike other applications of the right to counsel, the *Massiah* rule does not operate to foster or protect counsel's role as a representative whose expert assistance is necessary to minimize prejudice resulting from sources wholly external to the accused, such as unfamiliar legal proceedings or confrontations with witnesses. Counsel's role in *Brewer* and *Massiah* would presumably have been nothing more than to advise the accused to remain silent.

This suggests that the exclusionary rule, insofar as it seeks to ensure that an accused is not deprived of advice when being questioned by the government, may be concerned more with protection of the values served by the Fifth Amendment privilege against compelled self-incrimination than with protection of the kinds of rights for which professional legal assistance is customarily thought to be required. But while concern about the risk of compelled self-incrimination is appropriate when the accused is, as in *Brewer*, subjected to overt interrogation, the hazard of coercion is almost entirely absent when, as in this case, the accused engages in conversation with someone whom he does not know to be a government agent.

From a broader perspective, the decision in *Massiah* is perhaps best understood as reflecting a concern about the propriety of utilizing certain investigative techniques directed against the accused after the matter has progressed to an accusatory stage. Nevertheless, it is not entirely clear why an investigative technique, such as the use of an informant to

report back admissions made by the accused, which is entirely lawful before formal proceedings have been commenced, should become entirely unlawful thereafter. The initiation of proceedings does not always correspond to the completion of the investigation of a crime, and there may remain strong societal interests, compatible with the Sixth Amendment's policy to secure to the accused a fair trial, that call for the continuation of at least some investigation directed at the accused after the point of formal charge. These interests counsel against a broad extension of *Massiah* and *Brewer* to require the exclusion of statements that are fundamentally the product of the accused's volition and not of interrogation designed to elicit such statements.

In any event, applying the Sixth Amendment analysis used in the cases generally, it is clear that the mere passive presence of a government officer or informant in a position to overhear incriminating statements is not the type of "trial-like confrontation" at which the presence of counsel is required. Only where the government officer or informant engages in affirmative conduct intended to draw information from the accused about the charges against him can the encounter reasonably be compared to a "trial" or characterized as a "critical stage" of the prosecution at which the presence of counsel is necessary to enable the accused to deal with an expert adversary or unfamiliar procedures.

The result should be no different in the present case because respondent made the statements while

he was in jail awaiting trial instead of while free on bail, as was the defendant in *Massiah*. Although an inmate in jail does not have the freedom to choose his associates, this has no bearing on the Sixth Amendment issue. The loss of freedom inherent in incarceration is imposed for reasons wholly unrelated to inducing the defendant to speak. Mere incarceration prior to trial therefore cannot constitute "deliberate elicitation" of any incriminating statements the accused happens to make while in jail. Thus, the Sixth Amendment would not prohibit the introduction at trial of incriminating statements overheard by a jail official or an informant placed in an adjoining cell, because there would have been no affirmative action designed to induce the accused to talk. The same is true when statements are made to an informant sharing a cell with the accused, if the informant did not interrogate the accused or engage in conduct tantamount to interrogation in order to extract incriminating statements.

II

Even if the informant had questioned respondent about the charges against him, the Sixth Amendment should not be held to require exclusion of respondent's statements at trial. *Massiah* and *Brewer* require exclusion only where the government caused the accused to be interrogated or deliberately elicited the statements from him. In the present case, the responsible FBI agent expressly instructed the informant not to question respondent or to initiate conversation about the bank robbery. This demonstrates a meti-

culous concern on the government's part for respondent's Sixth Amendment rights. The purpose of the Sixth Amendment exclusionary rule to prohibit deliberate elicitation of statements by the government would therefore not be sufficiently furthered by prohibiting admission at trial of statements that followed questioning by an informant in complete disregard of his instructions to justify the costs associated with exclusion.

ARGUMENT

I

NO SIXTH AMENDMENT VIOLATION RESULTS FROM MERE ASSOCIATION OR GENERAL CONVERSATION BETWEEN A DEFENDANT AND AN INFORMANT

A. A Sixth Amendment Violation Does Not Occur Unless the Government Has Caused the Accused to be Questioned About the Offense

The court of appeals, while conceding that there was no evidence that Nichols had disobeyed instructions not to question respondent, nevertheless held (Pet. App. 7a) that respondent's Sixth Amendment right to the assistance of counsel was violated because, "by association, by general conversation, or both, [respondent] developed sufficient confidence in Nichols that [respondent] bared his incriminating secrets to an undisclosed paid informer" in the absence of counsel. The court found such association or general conversation to be "interrogation within the meaning of *Brewer*" (*ibid.*), requiring exclusion of respondent's statements at trial. The court's conclusion stretches the word "interrogation" far beyond the common understanding of the term[7] and far beyond the connotation intended in *Brewer*.

A reading of this Court's decisions demonstrates that, contrary to the conclusion of the court of appeals, the use by the government of an incriminating statement made outside the presence of counsel does not violate the Sixth Amendment, even if the statement is made while in association or general conversation with an informant. A Sixth Amendment violation has been held to occur only when the government deliberately elicits the statement—*i.e.*, engages in affirmative conduct reasonably calculated to overcome the accused's reluctance to talk for the specific purpose of inducing him to make incriminating statements.

In *Brewer* the defendant made incriminating statements while riding with police officers for several hours on a journey from Davenport to Des Moines, Iowa. The Court never suggested that the mere association between the officers and the defendant during the automobile trip to Des Moines itself entitled the defendant to the presence and assistance of counsel. Moreover, while en route, the defendant and the officers "embarked on a wide-ranging conversation covering a variety of topics" unrelated to the charges against him. 430 U.S. at 392. Yet the Court did not base its finding of a Sixth Amendment violation

---

[7] *Webster's New International Dictionary* (3d ed. 1961) defines "interrogate" to mean "to question typically with formality, command, and thoroughness for full information and circumstantial detail."

on the fact that the defendant happened to have made an incriminating statement following a period of general conversation with the police officers. "Indeed, far from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable." *United States* v. *Washington*, 431 U.S. 181, 187 (1977).

Thus, the Court in *Brewer* found a Sixth Amendment violation only after it concluded that the "Christian burial speech" made by the police detective in the car was a deliberate effort to elicit information that was tantamount to formal interrogation by the government (430 U.S. at 399-400); indeed, the Court specifically concluded that no Sixth Amendment right to counsel "would have come into play if there had been no interrogation." *Id.* at 400; see also *id.* at 410-413 (Mr. Justice Powell, concurring).[8]

The Court's decision in *Massiah* v. *United States*, *supra*, makes clear that the same standard applies where, as in the present case, the accused happens to make an incriminating statement in the presence of or overheard by a government agent or informant whose status as such is not known to the accused. The holding in *Massiah* was premised on surreptitious *questioning* of the defendant that was *intentionally*

[8] The dissenting opinions did not question the majority's premise that the presence of interrogation was a prerequisite to finding a constitutional violation. They concluded only that there had been no interrogation, 430 U.S. at 416 (Mr. Chief Justice Burger); *id.* at 438-441 (Mr. Justice Blackmun), or that there had been a waiver of the right to counsel, *id.* at 429-430 (Mr. Justice White).

arranged by the government, not on the mere fact that the statements were overheard by an informant and a government agent who happened to be in proximity to the accused.

In *Massiah* the informant, the accused, and other persons were jointly indicted for conspiracy to commit certain narcotics offenses. A few days after the indictment, and without Massiah's knowledge, one of his co-defendants decided to cooperate with the police in the continuing investigation of the narcotics activities. The informant permitted a government agent to install a radio transmitter under the front seat of his automobile. 377 U.S. at 202-203. The opinion of the court of appeals indicates that the informant, pursuant to the government's instructions, invited the defendant to enter his automobile and induced him to talk about the pending case. *United States* v. *Massiah*, 307 F.2d 62, 66 (2d Cir. 1962); *id.* at 72 (dissenting opinion). A government agent overheard the conversation by means of the transmitter installed in the informant's car and testified about the defendant's statements at trial. The court of appeals affirmed the conviction, but this Court reversed, finding a violation of the defendant's Sixth Amendment right to the assistance of counsel.

Although it is said in the Court's statement of the case that the government had overheard the statements (377 U.S. at 203), it is clear that the Court did not premise its finding of a Sixth Amend-

ment violation on the overhearing alone.[9] The Court's express holding was that "the petitioner was denied the basic protections [of the Sixth Amendment right to the assistance of counsel] when there was used against him at his trial evidence of his own incriminating words, which federal agents had *deliberately elicited* from him after he had been indicted and in the absence of his counsel." 377 U.S. at 206 (emphasis added); see also *id.* at 204.

The term "elicit" connotes a drawing out through affirmative action such as questioning, not simply overhearing,[10] and analysis of the Court's decision indicates that it intended the phrase "deliberately elicited" to mean procured through purposeful questioning of the defendant. The Court based its holding in part on the opinions of the four concurring Justices in *Spano* v. *New York*, 360 U.S. 315, 324-327 (1959),

[9] For example, the Court noted that petitioner argued in the case that it was constitutional error to permit the agent to testify about the statements he had overheard "under the circumstances disclosed by this record." 377 U.S. at 203; see also *id.* at 207. The circumstances disclosed by the record demonstrate, of course, that the informant had solicited information about the case from the defendant.

[10] *Webster's New International Dictionary* (3d ed. 1961) defines "elicit" to mean "to draw or bring out (something latent or potential) * * * to call forth or draw out." *Funk & Wagnalls New Standard Dictionary* (1946) defines "elicit" to mean: "To draw out as by some attraction or inducement; educe gradually or without violence; bring to light; as, to *elicit* information by inquiry; to *elicit* a reply." See also 3 Murray, *A New English Dictionary* (1897 ed.) ("to extract, draw out (information) *from* a person by interrogation"). Indeed, the word connotes a drawing out against the will or inclination of the other person. See *Webster's New International Dictionary* (2d ed. 1953).

which the *Massiah* Court took to be that reversal of a conviction is required when it is based upon a confession that had been "deliberately elicited by the police" after indictment (377 U.S. at 204). *Spano* involved in-custody interrogation of the defendant without the presence of counsel, and the quoted description of *Spano* therefore equates "deliberate elicitation" with interrogation.

The Court made the same point later in the *Massiah* opinion in the course of rejecting the government's suggestion that *Spano* could be distinguished because that case involved interrogation at the police station, while *Massiah* involved damaging admissions obtained from the defendant without his knowledge while he was free on bail. The Court stated that if its rule against deliberate elicitation of incriminating statements after indictment and in the absence of counsel " 'is to have any efficacy it must apply to indirect and surreptitious *interrogations* as well as those conducted in the jailhouse. In this case, Massiah was more seriously imposed upon * * * because he did not even know that he was under *interrogation* by a government agent.' " 377 U.S. at 206, quoting 307 F.2d at 72-73 (Hays, J., dissenting) (emphasis added).[11] Similarly, in explaining *Mas-*

[11] *Escobedo* v. *Illinois*, 378 U.S. 478 (1964), decided just five weeks after *Massiah*, held that police interrogation of the defendant after his arrest (but before indictment or other commencement of proceedings) in the absence of counsel and despite his request for counsel violated his Sixth Amendment rights. There was no occasion for the Court to consider

siah, the Court in *Brewer* stated (430 U.S. at 401) that "the clear rule of *Massiah* is that once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him." [12]

---

whether conduct falling short of such direct questioning would have violated the Sixth Amendment.

The holding in *Escobedo* that the defendant was entitled to the assistance of counsel even though proceedings had not yet been instituted against him has not been extended, and this aspect of *Escobedo* has been limited to its own facts. *Kirby* v. *Illinois*, 406 U.S. 682, 689 (1972) (plurality opinion). See also *Michigan* v. *Tucker*, 417 U.S. 433, 438 (1974).

[12] The court of appeals found support (Pet. App. 5a) for its broad holding that a Sixth Amendment violation occurs merely by virtue of the presence of a government informant or general conversation between the informant and the accused from the summary reversals by this Court in *Beatty* v. *United States*, 389 U.S. 45 (1967), and *McLeod* v. *Ohio*, 381 U.S. 356 (1965). In neither of these cases did the Court write an opinion, and it is well settled that such summary dispositions do not have the same precedential effect as cases fully briefed and argued on the merits. See *Parker* v. *Randolph*, No. 78-99 (May 29, 1979), slip op. 12-13 n.8 (plurality opinion); *Edelman* v. *Jordan*, 415 U.S. 651, 670-671 (1974).

In any event, a reading of the state court opinion reversed in *McLeod* demonstrates that the central question there was whether *Massiah* is applicable after the commencement of judicial proceedings but before an attorney has actually been retained by or appointed for the accused. *State* v. *McLeod*, 1 Ohio St. 2d 60, 62-63, 203 N.E.2d 349, 351-352 (1964). See *Developments in the Law—Confessions*, 79 Harv. L. Rev. 935, 999 (1966).

As for *Beatty*, any inference from the facts of that case that the Court was prepared to extend *Massiah* to mere acquisition of statements made by the accused without government provocation does not survive *Brewer*. See also *Weatherford* v. *Bursey*, 429 U.S. 545, 557-558 (1977).

B. The Policies of the Sixth Amendment Do Not Support an Extension of *Massiah* and *Brewer* to Bar the Admission of Statements Made to an Informant Who Did Not Interrogate the Accused or Otherwise Elicit the Statements

The Court did not fully articulate in *Massiah* and *Brewer* the Sixth Amendment principles underlying the right to counsel in situations in which the accused makes incriminating statements in the presence of a government agent or informant. A review of the precedents suggests that these holdings are something of a departure from other cases considering the Sixth Amendment right to counsel, especially where, as in *Massiah* and in the present case, the accused does not even realize that he is in the presence of a government agent or informant. Moreover, the holding in cases such as *Massiah* and *Brewer*, requiring the exclusion of admissions or confessions by the accused, deprives the courts and the public of highly probative and reliable evidence. Exclusion cannot therefore be justified in terms of that aspect of the right to counsel that is meant to safeguard the accuracy of the truthfinding process. These factors caution against extending *Massiah* to new situations unless compelling considerations of constitutional policy require that result. No such compelling considerations are present here.

1. *The Court Has Generally Recognized the Sixth Amendment Right to the Assistance of Counsel in the Context of "Trial-Like Confrontations" Between the Government and the Accused in Which the Accused is Confronted with Complex Legal Proceedings or an Expert Adversary*

Historically, the principal concern underlying the Sixth Amendment guarantee is the recognition that an unaided layman has little skill in arguing the law or in coping with an intricate procedural system. *United States* v. *Ash*, 413 U.S. 300, 307 (1973). Unfamiliar with rules of evidence or the standards by which to judge the charges against him, and lacking the skill and knowledge to prepare his defense, the defendant requires the "guiding hand of counsel." *Id.* at 307-308, quoting *Powell* v. *Alabama*, 287 U.S. 45, 69 (1932); see also *Fare v. Michael C.*, No. 78-334 (June 20, 1979), slip op. 11, 14; *Argersinger* v. *Hamlin*, 407 U.S. 25, 31-35 (1972); *Gideon* v. *Wainwright*, 372 U.S. 335, 344-345 (1963); *Johnson* v. *Zerbst*, 304 U.S. 458, 462-463 (1938). The assistance of counsel is also necessary to minimize the imbalance in the adversary system that results when "the prosecution is presented by experienced and learned counsel." *Johnson* v. *Zerbst*, *supra*, 304 U.S. at 463; see also *Moore* v. *Illinois*, 434 U.S. 220, 228-230 (1977); *Gideon* v. *Wainwright*, *supra*, 372 U.S. at 344.

The core of the counsel guarantee, at least as an historical matter, related to the assistance of counsel at trial, where the defendant would most directly confront the professional prosecutor and the complexities of the legal system. But over time, evolving concepts of due process led to judicial recognition that significant events occur before trial at which the defendant might likewise be confronted with intricate procedures or the professional prosecutor. See *United States* v. *Ash*, *supra*, 413 U.S. at 309-310. Accordingly, the Court extended the right to counsel to these additional "trial-like confrontation[s]" between the government and the accused (*id.* at 314)—encounters "that might appropriately be considered to be parts of the trial itself" (*id.* at 310). But in deciding whether to hold that the Sixth Amendment conferred a right in the circumstances, the Court consistently has been informed by the historical purposes underlying the guarantee—assisting the accused to cope with the legal system and his expert adversary—"and has expanded the constitutional right to counsel only when new contexts appear presenting the same dangers that gave birth initially to the right itself." *Id.* at 311.

For example, in *Hamilton* v. *Alabama*, 368 U.S. 52 (1961), the Court held that arraignment under Alabama law was a "critical stage" in the criminal proceeding at which the defendant was entitled to appointment of counsel, because certain pleas and defenses had to be made at that time or not at all, and what happened at arraignment might therefore affect the whole trial. *Id.* at 54; see also *White* v. *Maryland*, 373 U.S. 59 (1963). Similarly, in *Coleman* v. *Alabama*, 399 U.S. 1 (1970), the Court held that the Alabama preliminary hearing was a critical stage of

the prosecution at which "the guiding hand of counsel * * * is essential to protect the indigent accused against an erroneous or improper prosecution." 399 U.S. at 9 (plurality opinion). Counsel could, for example, expose factual weaknesses in the State's case and persuade the magistrate not to bind the accused over, preserve the testimony of witnesses favorable to the accused who might not appear at trial, fashion an impeachment tool for witnesses against the accused, endeavor to discover the State's case, and make effective arguments for the accused on such other matters as release on bail. *Ibid.* See also *Moore* v. *Illinois*, *supra*, 434 U.S. at 228; *Mempa* v. *Rhay*, 389 U.S. 128 (1967). Compare *Gerstein* v. *Pugh*, 420 U.S. 103, 122-123 (1975).

The Court has also recognized a right to the assistance of counsel in certain confrontations between the accused and the government outside of the context of formal judicial proceedings. For example, in *United States* v. *Wade*, 388 U.S. 218 (1967), the Court held that a pretrial lineup was a critical stage in the prosecution at which the accused is entitled to the assistance of counsel in order to protect his right to a fair trial. *Id.* at 226-227. In that context, the assistance of counsel is required, absent a waiver, to ensure that the lineup itself is not conducted in a suggestive or otherwise impermissibly prejudicial fashion that might affect the accuracy of testimony at trial, as well as to enable the defense to confront the identifying witnesses effectively at trial. *Id.* at 228-238; see *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 239 (1973).

But the Court has been cautious in expanding the Sixth Amendment right to counsel into new areas, cf. *Scott* v. *Illinois*, 440 U.S. 367 (1979), particularly in areas that do not involve formal proceedings. It has not, for example, extended the right to counsel to pretrial photographic identifications at which the accused himself is not present, because that situation does not involve a confrontation *by the accused* with an expert adversary or intricate or confusing proceedings. *United States* v. *Ash*, *supra;* cf. *Faretta* v. *California*, 422 U.S. 806 (1975). The Court has also indicated that the right to counsel recognized in *United States* v. *Wade*, *supra*, is not to be extended to other encounters at which the government extracts potentially unfavorable evidence from the accused, but which do not involve complex proceedings, confrontation with witnesses, or a realistic danger that the expert prosecutor or his agents will impermissibly prejudice the accused. See *Gilbert* v. *California*, 388 U.S. 263, 267 (1967) (no right to counsel at taking of handwriting exemplars); cf. *Schmerber* v. *California*, 384 U.S. 757, 765-766 (1966).

In all of the situations just discussed in which the Court has found a Sixth Amendment right to counsel, the role of the attorney has been the affirmative one of preparing the case on behalf of the defense (see *Powell* v. *Alabama*, *supra*, 287 U.S. at 58) and acting as the defendant's advocate in encounters with the government at which the defendant's case is advanced toward disposition or at which the reliability of the truthfinding process might be unfairly undermined.

See Grano, *Rhode Island* v. *Innis: A Need to Reconsider the Constitutional Premises Underlying the Law of Confessions*, 17 Am. Crim. L. Rev. 1, 9-10 & n.59 (1979); Enker & Elsen, *Counsel for the Suspect: Massiah* v. *United States and Escobedo* v. *Illinois*, 49 Minn. L. Rev. 47, 49-50 (1964).

2. *Sixth Amendment Policies Do Not Support a Broad Expansion of the* Massiah *Exclusionary Rule*

The right to the assistance of counsel identified in *Massiah* and *Brewer* cannot be so readily explained as a necessary protection at a stage in the proceedings or prosecution at which the case is advanced from charge to disposition or at which the accuracy of the truthfinding process might be unfairly affected. Aside, perhaps, from preventing overreaching to ensure that his client's responses are voluntary, counsel's role in *Massiah* and *Brewer*, as a practical matter, would probably be simply to tell the accused to say nothing, see *Watts* v. *Indiana*, 338 U.S. 49, 59 (1949) (Mr. Justice Jackson, concurring); Grano, *supra*, 17 Am. Crim. L. Rev. at 10 n.59, and thereby to deprive the court and the public of what will almost always be relevant and reliable evidence in the form of a confession or admission. See *Massiah* v. *United States*, *supra*, 377 U.S. at 209 (Mr. Justice White, dissenting).

The grounding in the Sixth Amendment of a right to counsel to accomplish this end has been questioned and criticized because of its perceived departure from the traditional, constitutionally recognized role of

counsel as an advocate and because of its tendency, like that of any prophylactic rule requiring the suppression of reliable evidence, to injure the strong public interest in enforcement of criminal laws; it is also objected to because it imposes the costs of evidentiary exclusion without regard to the presence or absence of genuine misconduct by the government in particular cases. *Massiah* v. *United States*, *supra*, 377 U.S. at 207-213 (Mr. Justice White, dissenting); *Escobedo* v. *Illinois*, 378 U.S. 478, 495-499 (1964) (Mr. Justice White, dissenting); Grano, *supra*, 17 Am. Crim. L. Rev. at 24-25; Enker & Elsen, *supra*, 49 Minn. L. Rev. at 66-69.[13]

---

[13] The role of counsel encompasses several distinct functions in the context of a criminal case. Virtually all of the Court's Sixth Amendment cases other than the *Massiah* line involve what might be called the representational function, which is not only important in assuring that the defendant is able to cope with complex legal proceedings, but which also serves an important societal goal of helping to assure that innocence will be vindicated when unfounded charges have been brought. The *Massiah* exclusionary rule, on the other hand, does not really operate to foster that function of counsel, but is instead concerned with what might be called the advisory or counselling function of the attorney—specifically, in this situation, counsel's role in advising the defendant against improvident actions or statements that might place incriminating evidence in the hands of the prosecution and ease its burden in establishing the defendant's guilt.

Without intending in any way to denigrate the importance and legitimacy of actions by counsel designed to keep a guilty defendant from carelessly or unwisely helping the prosecution, it is nevertheless not immediately evident that respect for this aspect of counsel's function demands application of an exclusionary rule that withholds probative evidence from the factfinder at trial. Provided the government has in no way impeded the giving and receipt of legal advice re-

These points seem particularly well-taken when the accused does not even know that he is speaking in the presence of a government agent or informant. In the view of some, to the extent that the Constitution speaks to the concerns underlying *Massiah* and *Brewer*, it is through the Fifth Amendment privilege against compulsory self-incrimination. See, *e.g.*, Enker & Elsen, *supra*, 49 Minn. L. Rev. at 57; cf. *Escobedo* v. *Illinois*, *supra*, 378 U.S. at 497 (Mr. Justice White dissenting). The Court's decision in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), in fact confirms that the right to counsel recognized in *Escobedo* was integrally related to protection of the Fifth Amendment privilege. *Id.* at 442, 464, 465.

The prophylactic measures adopted by the Court in *Miranda*, including the right to presence of counsel, were designed to protect the Fifth Amendment privilege in the specific setting of custodial police interrogation, which the Court believed to be inherently coercive. 384 U.S. at 445, 448-449, 469-473; *Beckwith* v. *United States*, 425 U.S. 341, 345-346 (1976). But the Court stressed that these protections would not apply in the absence of questioning, even when the suspect was in custody. 384 U.S. at 478.[14]

---

garding a pending criminal case, the balance between societal and individual interests with respect to counsel's functions would appear to tilt against the application of an exclusionary rule.

[14] Later cases have also made clear that the *Miranda* protections do not apply where there is interrogation, but at a time when the suspect is not in custody. See, *e.g.*, *Oregon* v. *Mathiason*, 429 U.S. 492 (1977); *Beckwith* v. *United States*, *supra*.

A similar approach has been taken under the Sixth Amendment when the accused is in custody following the commencement of proceedings against him. As *Brewer* demonstrates, custody alone—a mere proximity to persons known to be police officers—does not constitute the kind of "trial-like confrontation" to which the counsel guarantee attaches. Custody could be transformed into something akin to a "trial-like confrontation" triggering the right to counsel only when the government actively seeks information from the accused through interrogation. 430 U.S. at 399-401; see also *Spano* v. *New York*, *supra*, 360 U.S. at 325-326 (Mr. Justice Douglas, concurring); *id.* at 327 (Mr. Justice Stewart, concurring). Only then is the accused engaged by an expert adversary on matters relating to the charges against him, and only then could counsel's presence be necessary to protect the accused's Fifth Amendment privilege against compulsory self-incrimination, which may be threatened by such custodial interrogation. Compare *Miranda* v. *Arizona*, *supra*.

The Court in *United States* v. *Ash*, *supra*, also described *Massiah* as a case in which the assistance of counsel was necessary because counsel "could have advised his client on the benefits of the Fifth Amendment." 413 U.S. at 312. But no Fifth Amendment protection was needed in *Massiah*, because, unlike the accused in *Brewer*, the defendant in *Massiah* was not even arguably compelled by the government to speak, and, in fact, was not compelled to speak at all. Kamisar, *Brewer* v. *Williams*, *Massiah*, *and Miranda:*

What Is "Interrogation"? When Does It Matter?, 67 Geo. L.J. 1, 59, 63 (1978); Grano, *supra*, 17 Am. Crim. L. Rev. at 21 n.134. Thus, even if *Brewer* is thought to be consistent with Sixth Amendment precedent because counsel's presence is required in order to protect the Fifth Amendment privilege when the defendant knows he is in the presence of and is engaged in questioning by expert adversaries, it does not necessarily follow that the Sixth Amendment is implicated to the same degree when the accused does not even perceive that he is in the presence of a government agent or informant and therefore is not confronted with the possibility of government compulsion to which the Fifth Amendment speaks. These considerations weigh against broadly extending the Sixth Amendment right to counsel identified in *Massiah* and *Brewer*, as the court of appeals did in the present case, to new situations in which there is no evidence of affirmative conduct by the government akin to the interrogation present in each of those cases.

The foregoing difficulties in viewing the *Massiah* result from a Sixth Amendment right to counsel perspective also suggest that the decision may in part really reflect a concern about the use of certain investigative techniques at the post-accusation stage, rather than the right to counsel as such.[15] It is of

[15] In *United States* v. *Ash*, *supra*, the Court identified another role for counsel in *Massiah*, aside from advising the

course clear that the use of an informant to obtain incriminating statements from an individual prior to the time that charges are filed against him is entirely lawful. See, *e.g.*, *United States* v. *White*, 401 U.S. 745 (1971) (plurality opinion); *Hoffa* v. *United States*, 385 U.S. 293 (1966). It is not immediately

defendant about the Fifth Amendment privilege: to "shelter" the defendant "from the overreaching of the prosecution." 413 U.S. at 312. This suggests that the Court may have believed that the use of the informant to question Massiah constituted overreaching for reasons wholly independent of the right to counsel. Others have read *Massiah* as focusing, at least in part, on investigative techniques. See Enker & Elsen, *supra*, 49 Minn. L. Rev. at 57, 80-82; *Massiah* v. *United States*, *supra*, 377 U.S. at 212 (Mr. Justice White, dissenting).

But the Court has, in other contexts, fully approved of the use of undercover methods to solve crimes. See, *e.g.*, *Weatherford* v. *Bursey*, *supra*; *United States* v. *Russell*, 411 U.S. 423 (1973); *United States* v. *White*, 401 U.S. 745 (1971). There is no reason for the surreptitious nature of the investigation here to be determinative, for the Constitution "affords no protection to 'a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.'" *United States* v. *White*, *supra*, 401 U.S. at 749, quoting *Hoffa* v. *United States*, 385 U.S. 293, 302 (1966).

In any event, it would be somewhat odd to couch rules intended to limit investigative techniques in terms of an interference with the right to counsel, at least where those techniques do not intrude directly into the relationship between the accused and his attorney. Therefore, to the extent concern about investigative practices plays a role in these cases, the Court may at some point wish to consider reviewing them under the Due Process Clause, cf. *Hampton* v. *United States*, 425 U.S. 484 (1976); *United States* v. *Russell*, 411 U.S. 423, 431-432 (1973); *Rochin* v. *California*, 342 U.S. 165 (1952), rather than abiding by the Sixth Amendment analysis, with its attendant difficulties. See Grano, *supra*, 17 Am. Crim. L. Rev. at 21 & n.129, 22.

apparent, from the standpoint of the propriety of police practice, why investigative activities that are entirely lawful prior to the commencement of formal proceedings should become entirely unlawful after. It has been suggested that such a distinction is appropriate because the filing of formal charges shifts proceedings from an investigative to an accusatory stage. Grano, *supra*, 17 Am. Crim. L. Rev. at 18-25. But the realities of criminal investigation are not so abruptly altered by a change in classification. In fact, the filing of formal charges may be quite unrelated to the completion of the investigation of a crime. In some cases it is true that formal proceedings are initiated only after exhaustive police investigations and grand jury proceedings culminating in an indictment; but in others, a person may be arrested and charged on the basis of probable cause arising in the immediate aftermath of an offense and during an early stage of the investigation, but before there has been an opportunity to investigate fully his connection with the crime.

These variations warrant caution in viewing formal charges as a watershed after which otherwise proper investigative procedures may no longer be directed at the accused in any fashion. Even after charges have been filed, it is necessary to balance the concerns that support restrictions on post-accusation investigative techniques against what may often be a strong societal interest in continuing investigation. The standard set forth in *Brewer* and *Massiah* strikes a viable balance: the government may not,

after formal proceedings have been commenced, seek to induce confessions or admissions from the defendant through interrogation or its functional equivalent, but it may obtain and use at trial statements that are a product of the defendant's own volition, not government prompting. Accordingly, where the government acquires the statement without an effort to overcome the accused's reluctance to discuss the charges against him, it is proper that the accused should bear the risk of improvident revelations. See *United States* v. *White*, *supra*, 401 U.S. at 752.

There is, however, no need to consider more fully here whether the concerns underlying the Court's decisions in *Massiah* and *Brewer* would more appropriately be considered in a Fifth Amendment due process or self-incrimination analysis rather than a Sixth Amendment framework, or whether the possible concerns underlying *Massiah* would be more productively analyzed by focusing on the propriety of the use of any particular investigative technique during the "accusatory" stage, rather than on the right to counsel. For, as explained above, it is clear under this Court's decisions in *Brewer* and the other cases discussing the Sixth Amendment right to counsel generally that no violation occurs unless the government interrogates the accused, or engages in conduct that is the functional equivalent of such interrogation. And if interrogation or its functional equivalent is the appropriate standard under *Brewer*, when the accused knows he is in the presence of government

agents (and is therefore directly confronted with the expert adversary whom defense counsel is intended to counterbalance and is threatened with possible invasion of his Fifth Amendment privilege), it follows *a fortiori* that nothing short of interrogation, or conversation tantamount to it, should trigger the Sixth Amendment right to counsel when, as here, the accused makes a statement to a person he does not know to be a government agent or informant.

3. *The General Rule that No Sixth Amendment Violation Occurs in the Absence of Interrogation Applies in the Jail Setting*

There is no basis for arguing that a broader prophylactic rule is required under the Sixth Amendment when incriminating statements are overheard by the government without the accused's knowledge while he remains in custody, as in the present case, than when he is free on bail, as in *Massiah*. It is true that inmates do not have the freedom to choose their associates, as the defendant in *Massiah* did, see *Miller* v. *California*, 392 U.S. 616, 624 (1968) (Mr. Justice Marshall, dissenting from dismissal of certiorari), but this has no bearing on the Sixth Amendment issue.[16] Loss of freedom is inherent in custody, *Bell* v. *Wolfish*, No. 77-1829 (May 14, 1979), slip op. 15,

[16] Indeed, to the extent that the mention of the freedom to choose one's companions suggests that *Massiah* is somehow based on notions of privacy, this rationale would seem to have less applicability when the accused is in custody. There is an inevitable loss of privacy in jail, *Bell* v. *Wolfish*, No. 77-1829 (May 14, 1979), slip op. 37, and "official surveillance has traditionally been the order of the day." *Lanza* v. *New York*, 370 U.S. 139, 143 (1962); cf. *United States* v. *Hearst*, 563 F.2d 1331, 1347-1348 (9th Cir. 1977), cert. denied, 435 U.S. 1000 (1978). See generally Dix, *Undercover Investigations and Police Rulemaking*, 53 Tex. L. Rev. 203, 230 (1975).

and, significantly for present purposes, *it is imposed for reasons wholly unrelated to inducing the inmate to talk*, about his crime or about anything else. Thus, placing the accused in custody cannot alone be thought to constitute deliberate elicitation of any incriminating statements the accused might make while in custody. Cf. *Miranda* v. *Arizona*, *supra*, 384 U.S. at 445, 448-449, 469-473; *Beckwith* v. *United States*, *supra*, 425 U.S. at 345-346.

Accordingly, in the present case, if the informant had been in the cell next to respondent and overheard him make incriminating statements to his cellmate, no Sixth Amendment violation would have occurred. See *United States* v. *Hearst*, 563 F.2d 1331, 1347-1348 (9th Cir. 1977), cert. denied, 435 U.S. 1000 (1978). In that situation, it would be clear that the government had engaged in no affirmative conduct specifically designed to extract such statements from the accused. The same would be true if the accused made a statement that a prison guard happened to overhear. See, *e.g.*, *United States* v. *Barfield*, 461 F.2d 661 (5th Cir. 1972).

The result should be no different where the informant is in the same cell, rather than an adjoining one, and overhears statements that he has not in-

duced. In such a situation, there is likewise no incremental action by the government—beyond the fact of custody itself—that has the purpose or effect of drawing a confession or admission from the accused. The fact that the cellmate is an informant has no impact on the *accused*, because the informant appears to him to be an ordinary cellmate. Whether the accused makes any statements is therefore dependent on his own disposition to do so. Only if the informant interrogates the accused about the charges against him (or initiates a conversation about the charges that is "tantamount to interrogation") can it be said that any incriminating statements that follow have been improperly elicited.[17]

While this Court has twice granted review in cases involving the application of *Massiah* to the jail context, neither case resulted in a decision on the merits. In *Milton* v. *Wainwright*, 407 U.S. 371 (1972), a police officer posing as a fellow inmate was placed in the accused's cell and, after extensive prodding to overcome the latter's reluctance to discuss the offense with which he was charged, allegedly secured a confession. The Court merely assumed *arguendo* that this conduct, which appears to have been tantamount to rather extended interrogation, violated *Massiah;* it upheld the denial of habeas relief on the ground that admission of the confession at the accused's trial was harmless error in the particular circumstances of

[17] Even then, this elicitation should not be attributed to the government, where, as here, the government instructed the informant not to question the accused. See pages 45-51, *infra*.

that case. And in *Miller* v. *California*, 392 U.S. 616 (1968), which involved statements elicited by an undercover officer in the accused's cell prior to indictment, the writ was dismissed as improvidently granted. Obviously neither of these cases in the least undermines the conclusion that *Brewer*'s standard, requiring interrogation or its equivalent as a prerequisite to finding a *Massiah* violation, applies whether an accused is free on bond, in jail, or in any other form of custody.

The Second Circuit interpreted *Brewer* and *Massiah* in precisely this manner in *Wilson* v. *Henderson*, 584 F.2d 1185, 1190-1191 (2d Cir. 1978), cert. denied, No. 78-6610 (June 18, 1979). That case also involved a defendant who made incriminating statements to a cellmate who happened to be an informant. There, as here, the informant was instructed not to question the defendant about his crime, but to listen for any statements the defendant might make. The court found the absence of questioning dispositive under *Massiah* and *Brewer*, and it accordingly denied habeas relief. There, as here, "[t]he instructions to [the informant] suggest a conscious effort on the investigating officer's part to guard [the defendant's] constitutional rights * * *. His directions [not to question the defendant] suggest familiarity and attempted compliance with, not circumvention of, the principle of *Massiah*." 584 F.2d at 1191.

The Ninth Circuit also reads *Brewer* and *Massiah* as requiring interrogation as a prerequisite to a find-

ing of a Sixth Amendment violation when the government surreptitiously overhears incriminating statements made by the defendant. See *United States* v. *Hearst*, *supra*, 563 F.2d at 1347-1348. In *Hearst*, in which the government overheard conversations between the defendant and a friend in the visiting room of the jail where she was incarcerated prior to trial, the court found no violation of the right to counsel because the government had not formally or informally interrogated the defendant. See also *United States* v. *Hayles*, 471 F.2d 788, 791-792 (5th Cir.), cert. denied, 411 U.S. 969 (1973).[18]

On the record before the Court in this case, there is no evidence of affirmative action by the government, or by the informant Nichols, to induce respondent to make incriminating statements. The FBI agent instructed the informant not to question respondent, and there is no evidence in the record that he did so. Also, although we do not believe these additional facts to be indispensible to our position, the FBI agent did not request that the informant be placed in the cell with respondent and, in fact, did not even appear to know that he was in that cell. The court of appeals therefore erred in finding that respondent's right to counsel had been violated.

---

[18] See also *Weatherford* v. *Bursey*, *supra*, 429 U.S. at 551-552, pointing out that the government had overheard conversations by the defendant in *Black* v. *United States*, 385 U.S. 26 (1966), and *O'Brien* v. *United States*, 386 U.S. 345 (1967), some, but not all of which were with the defendant's counsel. The Court appears to have perceived a Sixth Amendment issue only with respect to the monitored conversations with defense counsel.

II

EVEN IF THE INFORMANT HAD VIOLATED HIS INSTRUCTIONS FROM THE FBI AGENT NOT TO QUESTION RESPONDENT ABOUT HIS OFFENSE, THIS QUESTIONING WOULD NOT HAVE CONSTITUTED GOVERNMENT INTERROGATION

As discussed above, the Court held in *Brewer* that "the clear rule of *Massiah* is that once adversary proceedings have commenced against an individual, he has a right to legal representation when the *government* interrogates him." 430 U.S. at 401 (emphasis added). Thus, unless the *government* takes some affirmative action to elicit incriminating statements from the accused, no Sixth Amendment violation occurs when the accused makes incriminating statements to a third person, even though the third person in turn reports those statements to the government.

In the present case, Nichols was instructed not to question respondent about the crime of which he was accused, and there is nothing in the record to suggest that he did. But even if Nichols violated his instructions and questioned respondent, that unauthorized action should not be held to have constituted deliberate elicitation by the government that would justify suppression of respondent's statements under the *Massiah* exclusionary rule. This situation would be essentially the same as if a fellow prisoner had asked questions of respondent on his own initiative and only later decided to convey the information to the government. In neither case would the government have authorized the informant to question the respondent, and in neither should the questioning be attributed to the government.

This point is vividly illustrated in the present case. Sadler, another of respondent's cellmates, also testified at trial about incriminating statements made by respondent, but Sadler had not contacted the FBI until after respondent made the statements. From Sadler's testimony (A. 31-37; Tr. 140-150), it does not appear that he initiated conversations with respondent about the bank robbery. But if he had, it is clear that respondent's Sixth Amendment right to counsel would not have been violated when Sadler testified at trial because the government would not be implicated in the questioning at all. The result should not be any different with respect to any unauthorized questioning by Nichols.[19]

Moreover, where probative and reliable evidence such as a confession or admission is concerned, it is necessary to balance the interests to be fostered by application of an exclusionary rule against the important public interest in the availability of such evidence. The purpose of the *Massiah* exclusionary rule is to prevent the government from deliberately eliciting statements from the accused after proceedings have begun and introducing those statements at trial. This purpose would not be incrementally furthered by

[19] Even when a person awaiting trial has made no prior arrangements with the government to report statements made by a fellow inmate, he would have incentive to do so in order to make a favorable deal with the prosecution in his own case. See, *e.g.*, *People* v. *Cardona*, 41 N.Y.2d 333, 360 N.E.2d 1306, 392 N.Y.S.2d 606 (1977). Indeed, in the present case, Sadler testified that he informed the FBI of respondent's statements on the advice of his attorney, in relation to his own case (A. 33-34; Tr. 143-144).

extending the exclusionary rule to a situation in which the responsible government agent—here FBI Agent Coughlin—in a good faith effort to comply with *Massiah*, instructed the informant not to question the accused and did not engage in any other action that attempted to bring about improper elicitation of the statements. Cf. *Michigan* v. *DeFillippo*, No. 77-1680 (June 25, 1979).

Thus, even if the informant in this case did violate his instructions and interrogated respondent about the bank robbery, only a wooden rule attributing to the government *all* acts of the informant without regard to the government's efforts to control or its responsibility for the informant's actions, would support exclusion of respondent's statements at trial.[20] But surely, not all acts of an informant with whom the responsible government official enters into a limited and specific relationship can be held to be deliberate governmental actions under *Massiah* and *Brewer*. Sixth Amendment principles do not support such attribution. Where an informant, rather than a trained undercover law enforcement officer, obtains the statements, without governmental involvement similar to that in *Massiah*, the accused is not confronted with

[20] We assume for present purposes that if Nichols were a government employee, rather than an informant, respondent's Sixth Amendment rights would have been violated even if Nichols countermanded specific instructions not to question respondent. But the government is not so broadly accountable for the acts of an agent who is not an employee, because of its diminished capacity to direct his actions. See *Restatement (Second) of Agency* § 216, Comment a (1958).

the expert governmental adversary whose skills are intended to be offset by defense counsel under the Sixth Amendment cases discussed above.

In addition, the cases establish that generally the government must significantly involve itself with private activity before that activity is rendered "governmental action" for purposes of constitutional protections. For example, in *Moose Lodge* v. *Irvis*, 407 U.S. 163 (1972), the Court held that a state's grant of a liquor license to a private club that practiced racial discrimination did not render the discriminatory practice of that club "state action" for purposes of the Equal Protection Clause of the Fourteenth Amendment. The Court noted that where the impetus for the discrimination is private, the state must have "significantly involved itself" with the invidious discrimination in order for the action to fall within the ambit of constitutional prohibitions. 407 U.S. at 173, quoting *Reitman* v. *Mulkey*, 387 U.S. 369, 380 (1967); see also *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974). Even where the government has extensive contacts with the private entity, specific actions by that entity will not give rise to a constitutional violation unless the government has in some manner approved it. *Flagg Bros. v. Brooks*, 436 U.S. 149, 164 (1978). These principles have been applied in connection with the Fourth Amendment's exclusionary rule as well. See, *e.g.*, *United States* v. *Janis*, 428 U.S. 433, 456 n.31 (1976); *Burdeau* v. *McDowell*, 256 U.S. 465 (1921).

In the present case, there is no basis for concluding that the federal government "significantly involved itself" with any questioning Nichols might have instigated. There is no evidence that the government directed, authorized, encouraged or knew of any such questioning. See *United States* v. *Rodriguez*, 596 F.2d 169, 173 (6th Cir. 1979); *United States* v. *Wedelstedt*, 589 F.2d 339, 346 (8th Cir. 1978), cert. denied, No. 78-1383 (June 4, 1979); *United States* v. *Luciow*, 518 F.2d 298 (8th Cir. 1975); *United States* v. *Clegg*, 509 F.2d 605, 608-609 (5th Cir. 1975); *United States* v. *Valen*, 479 F.2d 467 (3d Cir. 1973), cert. denied, 419 U.S. 901 (1974); compare *Corngold* v. *United States*, 367 F.2d 1, 4-5 (9th Cir. 1966) (en banc). Indeed, the FBI agent specifically disapproved of the conduct. See *United States* v. *Stonehill*, 274 F. Supp. 420, 422, 424 (S.D. Cal. 1967), aff'd, 405 F.2d 738 (9th Cir. 1968), cert. denied, 395 U.S. 960 (1969); *United States* v. *Mekjian*, 505 F.2d 1320 (5th Cir. 1975); *State* v. *Ferrari*, 112 Ariz. 324, 541 P. 2d 921, 928 (1975). The government did not operate the jail or have the authority to assign prisoners in the jail, compare *State* v. *Smith*, 107 Ariz. 100, 482 P.2d 863, 866 (1971), did not request that Nichols and respondent be placed in the cell in order to question respondent, *United States* v. *Aloisio*, 440 F.2d 705, 710 (7th Cir.), cert. denied, 404 U.S. 824 (1971), and did not engage in any other conduct that would suggest a

deliberate circumvention of respondent's Sixth Amendment rights by using a private party to do what the government itself could not do. Compare *United States* v. *Valen*, *supra*, 479 F.2d at 469, with *Corngold* v. *United States*, *supra*, 367 F.2d at 5. Thus, even if Nichols did question respondent in a fashion prohibited to the government itself, this would "evidence[] something less than that degree of [government] participation" that concerned the Court in *Massiah*. *United States ex rel. Milani* v. *Pate*, 425 F.2d 6, 8 (7th Cir.), cert. denied, 400 U.S. 867 (1970).

This conclusion is not inconsistent with the Court's decision in *Sherman* v. *United States*, 356 U.S. 369 (1958), in which the Court concluded that the defendant had been entrapped into dealing in narcotics by the overbearing urgings of an informant. The Court discussed (356 U.S. at 374-375) the prior relationship between the government and the informant and noted (*id.* at 374-375) that "the federal agent in charge of the case admitted that he never bothered to question [the informant] about the way he had made contact with [the defendant]." Against this background, the Court concluded that the government could not utilize the services of an informant in this manner and then disassociate itself from his conduct (*id.* at 375). *Sherman* contrasts sharply with the present case. Far from showing the carelessness that led the Court in *Sherman* to conclude that the government should be responsible for the undirected actions of the informant, the FBI agent here gave Nichols

instructions that indicate "familiarity and attempted compliance with, not circumvention of, the principle of *Massiah*." *Wilson* v. *Henderson*, *supra*, 584 F.2d at 1191. There is therefore no need to impose a broad rule attributing to the government all of the actions of an informant with whom it enters into a limited and specific relationship. Only where the government has directed the informant to question the accused, or has placed the informant in a situation where incriminating statements are likely to be overheard without adequately instructing him—and thereby assuming the risk that the informant would engage in questioning to benefit the government—should the government be held to have "deliberately elicited" statements that are made in response to the informant's questions.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

DAVID B. SMITH
Attorney

NOVEMBER 1979

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 305840 140

Supreme Court, U. S.
FILED
DEC 12 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-121

UNITED STATES OF AMERICA,

Petitioner,

v.

BILLY GALE HENRY,

Respondent.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT

MICHAEL E. GELTNER
LARRY J. RITCHIE
WILLIAM W. GREENHALGH
Georgetown University Law Center
Appellate Litigation Clinic
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
Tele: (202) 624-8296

Attorneys for Respondent

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... (i)

QUESTION PRESENTED 1

STATEMENT OF THE CASE 2

INTRODUCTION 2

I. TRIAL AND DIRECT APPEAL 2

II. THE FIRST §2255 MOTION AND APPEAL 6

III. PROCEEDINGS AFTER REMAND 9

IV. THE SECOND §2255 MOTION AND APPEAL 11

V. THE DECISION APPEALED FROM 13

SUMMARY OF ARGUMENT 16

ARGUMENT 17

I. THE COURT OF APPEALS CORRECTLY FOUND A VIOLATION OF HENRY'S SIXTH AMENDMENT RIGHT TO COUNSEL 17

A. The Rule Established In *Massiah v. United States* 17

B. Henry's Right To Counsel Was Violated If Either Nichols Induced Or Henry Volunteered His Statements 25

C. The Fourth Circuit Was Correct In Concluding That Nichols Had Effectively "Interrogated" Henry Simply By Engaging Him In General Conversation 26

D. The Fourth Circuit Correctly Concluded That Nichols' Questioning Of Henry Constituted A Government Interrogation 29

CONCLUSION 33

TABLE OF AUTHORITIES

Cases:

Allen v. International Alliance, 338 F.2d 309, 318 (5th Cir. 1964) 32

Beatty v. United States, 389 U.S. 45 (1967), *rvs'g* 377 F.2d 181 (5th Cir. 1967) 22,25,34

Belcher v. Stengel, 429 U.S. 118 (1976) 33

Brady v. Maryland, 373 U.S. 83 (1963) 9

Brewer v. Williams, 430 U.S. 387 (1977) 14,15,26,29

Edelman v. Jordan, 415 U.S. 651, 671 n.14 (1974) 22

Gilbert v. California, 388 U.S. 263 (1972) 19

Hoffa v. United States, 385 U.S. 293, 302 (1966) 15

Hopper v. Louisiana, 392 U.S. 658 (1968) 22

Johnson v. Zerbst, 304 U.S. 458, 464 (1938) 28

Kirby v. Illinois, 406 U.S. 682, 689 (1972) 19

McLeod v. Ohio, 381 U.S. 356 (1965), reversing State v. McLeod, 1 Ohio St.2d 60, 203 N.E.2d 349 (1964) 19,21,22,25,34

Massiah v. United States, 377 U.S. 201 (1964) . . . . . ***passim***

Malloy v. Hogan, 378 U.S. 1 (1964) 18

Michigan v. Tucker, 417 U.S. 433 (1974) 18

Miller v. Pate, 386 U.S. 1 (1967) 9

Miller v. California, 392 U.S. 616, 625 (1968) 26,27

Milton v. Wainwright, 407 U.S. 371, 382 (1972) 21

Miranda v. Arizona, 384 U.S. 436 (1966) 16,18,20

Monrosa v. Carbon Black, Inc., 359 U.S. 180 (1958) 33

Moore v. Illinois, 434 U.S. 220 (1977) 19

Parker v. Randolph, 99 S.Ct. 2132, 2140, n.8 (1979) 22

Roberts v. Russell, 392 U.S. 293 (1968) 22

Spano v. New York, 360 U.S. 315 (1959) 20,25

Sherman v. United States, 356 U.S. 369 (1958) 31

United States v. Anderson, 523 F.2d 1192, 1196, n.3 (5th Cir. 1975) 26,27

United States ex rel. Baldwin v. Yeager, 428 F.2d 182 (3rd Cir. 1970) 16,30

United States v. Wade, 388 U.S. 218 (1967) 19

Wilson v. Henderson, 584 F.2d 1185 (2nd Cir. 1978) 33

Articles:

Dix, Undercover Investigations and Police Rulemaking, 53 Texas L. Rev. 203, 230 (1975) 24

Kamisar, Brewer v. Williams, Massiah, and Miranda: What is Interrogation? When Does it Matter?, 67 Geo. L. J. 1, fn. 272 (1978) 21,24,27

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-121

UNITED STATES OF AMERICA,

Petitioner,

v.

BILLY GALE HENRY,

Respondent.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT

QUESTION PRESENTED

Whether the record below established that the government violated Henry's Sixth Amendment right to counsel when, after Henry's indictment, the F.B.I. procured Henry's jail cellmate, a long-time paid informant, to cultivate Henry's friendship and confidence in order to elicit admissions to be used in Henry's pending trial, and when the informant engaged Henry in

conversations and then testified as a surprise witness at Henry's trial and testified that Henry had admitted participating in the crime.

STATEMENT OF THE CASE

INTRODUCTION

This case is here on a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit directing that Respondent Billy Gale Henry's motion to vacate sentence under 28 U.S.C. §2255 be granted and Henry released from custody unless the government elects to retry him. Henry was tried and convicted of armed bank robbery and received a twenty-five year sentence. His conviction was affirmed on direct appeal. Judge Richard B. Kellam of the United States District Court for the Eastern District of Virginia twice denied Henry's motion to vacate sentence under 28 U.S.C. §2255, without hearing. On Henry's second appeal to the Fourth Circuit, the Court of Appeals held that Henry's right to counsel had been violated under the rule established in *Massiah v. United States*, 377 U.S. 201 (1964). This Court granted certiorari to review the judgment.

I. TRIAL AND DIRECT APPEAL

On August 28, 1972, two masked gunmen in green fatigues robbed the Janaf Branch of the United Virginia Bank/Seaboard National, located directly across the

street from F.B.I. headquarters in Norfolk, Virginia (Tr. 8-10, 35-36).[1] By the time of Henry's trial, Johnny Ray Moore and John Oscar Luck had been convicted for this robbery. Even though only two men had entered the bank, the government nonetheless successfully convicted three men on the theory that each was in the bank. The only identifying eyewitness to the crime, John Peterson, a bystander who was outside the bank when the two robbers came out unmasked, identified Moore as one, could not definitely identify Luck, and testified that Henry definitely was not the third man he had observed waiting in the getaway car (A. 19-21, Tr. 48-50, 53). He described this man as white, with long blond hair, and around twenty-seven years old (Tr. 54). Henry, some twenty years older, in no way fit Peterson's description. Moreover, fingerprints taken from the bank where one of the robbers assaulted a teller were not Henry's (Tr. 66, 110). The strongest evidence the prosecution produced which linked Henry to the bank robbery was Henry's palmprint, implanted on a lease and a rent receipt to a Mr. Norris.[2] Both were found in the backseat of the getaway car, which was found abandoned about an hour and a half after the robbery (Tr. 72-74). The lease and rent receipt were to a house on Wailes Avenue in Norfolk. The F.B.I. agents and police then went to the Wailes Avenue

---

[1] "Tr" refers to the trial transcript. When in the Appendix, the reference will also be to the appendix page (e.g., A ____, tr ____).

[2] The prosecutor tried to tie the name to Henry with evidence that he had rented an Atlanta, Georgia apartment under the name of Robert A. Norris and, as R. A. Norris, had bought radio scanner crystals (tr 156, 162).

address, where they arrested Moore and Luck and seized the bank money and crime paraphernalia (Tr. 80-82).

Henry was arrested for the Janaf bank robbery November 1, 1972 in the front yard of his Atlanta, Georgia residence. At a post-arrest interrogation conducted by F.B.I. Agent Nicholas V. O'Hara, Henry denied participating in the robbery or renting the house for which the lease was signed (Tr. 105-106). On November 15, 1972 a federal grand jury indicted Henry for the Janaf bank robbery in violation of 18 U.S.C. §2113(a) and (d).

Prior to trial, at a discovery hearing before District Judge Kellam, on December 27, 1972, Assistant United States Attorney Sims promised to "furnish statements of the accused, if any" (A. 10-11), as required by Rule 16 of the Federal Rules of Criminal Procedure. Neither written statements nor information that the prosecution would offer testimony of oral statements were turned over to the defense before trial.

At trial, to the complete surprise of the defense (A. 30, Tr. 137), the prosecutor produced two of Henry's former jail cellmates as witnesses against Henry: Edward B. Nicholas and Joseph D. Sadler. Nichols testified that he had had "opportunit[ies] to have some conversations with Mr. Henry while he was in the jail" (A. 28, Tr. 134). Sadler testified that Henry started talking to him about the crime (A. 33, Tr. 142).

Nichols testified that Henry said that he had been in the bank that he was accused of robbing several times to exchange money, and one time had been turned away because the bank was closed. He said that the reason Henry gave him for going in the bank was

because he wanted to see who opened the vault (A. 29, Tr. 136). Nichols further testified that Henry talked about several people going into the bank, "about showing guns, and a bank teller was hit" (A. 30, Tr. 138). Finally, Nichols said that Henry told him that the only thing to connect him to the bank was a rent receipt for a house he had rented (A. 30, Tr. 138).[3] He did not testify that he was a paid F.B.I. informant either at the time he was in jail with Henry or at trial.

Sadler's testimony against Henry was equally inculpatory. Sadler stated that, after Henry had a "feeling [for] what type of guy I was" (A. 33, Tr. 142) Henry made "reference that him and a fellow by the name of Luck or Lucky or something of that sort" and another man went into the bank while another man stood outside the door, and a woman waited in the getaway car. He testified that Henry had said he had to hit one of the bank officials, had taken some money and had worn a mask (A. 33, Tr. 142). On cross-examination, Sadler also admitted that he was a convicted felon and that he contacted the F.B.I. about his testimony (A. 33-34, Tr. 143), and, although he had not been promised any help in exchange for his testimony, he expected to be released from jail on probation (*Ibid.*)

Henry was convicted and sentenced to imprisonment for twenty-five years (Tr. 249). Henry's conviction was affirmed *per curiam* by the Fourth Circuit, 483 F.2d 1401 (4th Cir. 1973) and certiorari was denied, 421 U.S. 915 (1975). Henry did not raise his Fifth and Sixth Amendment claims concerning Nichols and Sadler

[3]On cross-examination, Nichols testified that, when Henry discussed the rent receipt, it was in the context of a conversation concerning the charges against Henry (A 31, Tr 139).

because he was unaware, at the time, that Nichols was a paid F.B.I. informant or that the government had knowingly allowed Sadler to perjure himself at trial.

II. THE FIRST §2255 MOTION AND APPEAL

Two years after trial Henry became aware of Nichols' role as an F.B.I. informant, and he moved to vacate conviction under 28 U.S.C. §2255 alleging, *inter alia*, that his Sixth Amendment right to counsel had been violated by the government's use of Nichols, in violation of the rule of *Massiah v. United States*, 377 U.S. 201 (1964).

Henry alleged that Nichols was a paid F.B.I. informer prior to the Henry case investigation, and that Nichols had called Special Agent Gerald T. Coughlin, an agent he had worked for in the past (A. 56-57). Henry claimed that Nichols received pay and rewards for his investigation in the Henry case and that he had continued to work for the F.B.I. since that time *(Ibid.)*, Henry claimed that Nichols had called him out on a visit on December 3 or 4, 1972 at the Norfolk City Jail and that, after Henry's transfer to the Portsmouth City Jail, Nichols came there at least twice to visit him. (A. 56-57) Henry further alleged that he had refused to talk to the F.B.I., but "they used 'informer Nichols' to do something the F.B.I. could not do, question the Petitioner—all without the presence of counsel" (A. 65). This, asserted Henry, was a "violation of the standards and guidelines set-out [sic] by the United States Supreme Court in the *Massiah* case" (A. 57). Henry additionally pointed out that Nichols, as a paid informer, had gathered information from him as an "arm of the law" and "under the color of law enforcement" (A. 65). Henry summarized his Sixth Amendment claim:

> Henry had aggressively dismissed the F.B.I. agents as they attempted to question him, [and] informer E.B. Nichols was used to engage Henry in conversation for the F.B.I. and their investigation. (A. 57).

In the same motion, Henry also alleged that the government made knowing use of Sadler's perjured testimony at trial, in violation of the due process clause of the Fifth Amendment, when F.B.I. Agent O'Hara knew that Sadler's testimony was not true (A. 56). After his trial, on April 13, 1973, Henry obtained the affidavit of yet another of his cellmates, Joseph Ray Conway.[4] Conway swore that he and Sadler were in the same cell as Henry, and that "we talked together quite a lot." One night Sadler told Conway that he couldn't stand going back to prison:

> "I asked him how he could keep from going, he told me he would tell the F.B.I. that Henry robbed the United Virginia Bank of Janaf Shopping Center. I said 'but Billy never admitted robbing no kind of bank' Sadler said, 'I know, he never admitted it, but I'll tell this to the F.B.I. and they'll keep me from going to prison' . . ."

Henry alleged that Sadler called the F.B.I. about December 12, 1972 and Conway was then mysteriously transferred to the State Farm, though his trial process was incomplete, and Henry also transferred to a different jail. He contended "[t]he F.B.I. did this to

[4]Conway's sworn affidavit, originally filed in the Fourth Circuit, was quoted in whole in Henry's *pro se* motion to vacate conviction (A 54).

avoid Henry becoming aware of the informers who were to testify—in the case of Sadler, Purjure [sic] himself at the Henry trial."

District Judge Kellam, without any hearing, dismissed Henry's motion on August 26, 1975, indicating that the issues were, or should have been, raised on direct appeal.

Henry appealed Judge Kellam's dismissal order *per se*, and, in a *per curiam* decision rendered without oral argument by Judges Winter, Craven, and Butzner, the United States Court of Appeals for the Fourth Circuit concluded that Henry's Fifth and Sixth Amendment claims were not meritless. No. 75-2142, decided March 29, 1977 (Pet. App. 54a-56a). Referring to Nichols' testimony, the court indicated that "[b]ecause Henry's attorney was not present during those conversations and Henry had not knowingly and intelligently waived his right to have his attorney present, questioning under such circumstances would be violative of his rights under the Sixth Amendment" (Pet. App. 55a). It considered Nichols' trial testimony that he had not asked Henry specific questions no refutation of Henry's claim that Nichols was paid to obtain evidence against Henry and held that it was "necessary to conduct an evidentiary inquiry to determine whether [Nichols] was acting as a government agent during his interviews with Henry . . ." The court also noted that Henry alleged that Sadler had perjured himself and that the government had arranged to have Conway moved from Henry's cell, prior to trial, to prevent Henry from discovering that perjured testimony might be used against him. "Proof of such allegations," said the court, "would establish that Henry's conviction was unconsti-

tutional under both *Brady v. Maryland*, 373 U.S. 83 (1963) (government suppression of exculpatory evidence), and *Miller v. Pate*, 386 U.S. 1 (1967) (knowing use of perjured testimony)" (Pet. App. 55a). The court of appeals remanded Henry's §2255 motion for an evidentiary inquiry on the Fifth and Sixth Amendment issues.[5] (Pet. App. 56a).

III. PROCEEDINGS AFTER REMAND

On remand, Judge Kellam purposely limited the "evidentiary inquiry" so as to avoid a hearing in open court. The Chief Judge wrote the Assistant United States Attorney and requested the F.B.I. agents' affidavits, in the hopes that he might be able to "dispose of this matter without the necessity of a public hearing" (A. 82). Judge Kellam neglected to send Henry a copy of this letter, to apprise him of the steps he had taken in his "evidentiary inquiry." In a closing thought, Judge Kellam noted that "[i]f, by chance the agents did request Sadler or Nichols to interview Henry, we probably will have to grant a hearing" (A. 83).

Also after the remand, Henry filed an amended §2255 motion on June 29, 1977 (A. 71-82). The amended complaint, suggested by the court of appeals' order, supplied Judge Kellam with much more detailed allegations than were made to the district court in the

[5] In relation to other claims raised by Henry, notably his claim that the government failed to comply with the pre-trial discovery agreement, the Court noted "it would be appropriate for the district court to permit Henry to develop those additional claims at the same time it examines the issues for which an evidentiary hearing is otherwise necessary" (Pet. App. 56a).

original §2255 motion.

In September, 1977 the prosecutor submitted the affidavits of F.B.I. agents Gerald T. Coughlin (Pet. App. 57a-60a) and Nicholas V. O'Hara (A. 84-85).

The Coughlin and O'Hara affidavits confirmed Henry's story concerning the traffic of informers and agents in and out of the Norfolk City Jail. While Henry was there pending trial, both Joseph D. Sadler and Edward B. Nichols were moved into Henry's cell.

In his affidavit, Coughlin swore that he participated in the Janaf bank robbery investigation and contacted Nichols on November 21, 1972. Coughlin admitted that Nichols had been providing confidential information for about a year for pay (Pet. App. 59a). He said that he told Nichols "not to initiate any conversations with Henry regarding the bank robbery charges against Henry, but if Henry initiated the conversations with Nichols, to pay attention to any information furnished by Henry" (Pet. App. 58a). On December 6, 1972, according to Coughlin, he again contacted Nichols, who, by that time, had been released from Norfolk City Jail. Nichols told Coughlin that "Billy Gale Henry had engaged him in conversation while he was in jail with Henry . . ." and that "Henry had talked to Nichols about the bank robbery charges against him" (Pet. App. 58a). The affidavit further stated that Nichols discussed with Henry plans for Nichols to act as a go-between for Henry once Nichols was released from jail. Apparently with Coughlin's tacit approval, "Nichols advised that he would comply with Henry's request and report the information to the F.B.I." (Pet. App. 59a). Finally, Coughlin's affidavit said that Nichols was paid by the F.B.I. "for expenses and services in connection with the

requests of Henry, and for the information furnished by Nichols" *(Ibid.)*.

O'Hara's affidavit confirmed that he had participated in the investigation of the bank robbery and that he was aware that agent Coughlin had obtained information from an informant (A. 84). O'Hara also indicated that on February 23, 1973 he interviewed Joseph Sadler at the Norfolk jail, and at that time Sadler furnished information to him, which Henry allegedly had volunteered to Sadler (A. 85). O'Hara stated that he did not direct Sadler to seek out Henry, or obtain information from him *(Ibid.)*. Although he denied contacting jail authorities to place cellmates with Henry and denied arranging transfers for Henry, O'Hara did not address the contention that Conway had been transferred to keep Sadler's upcoming perjury from Henry.

IV. THE SECOND §2255 MOTION AND APPEAL

Armed with two F.B.I. affidavits and one prisoner's *pro se*, inartfully pleaded, amended, and lengthy complaint, Judge Kellam concluded his "evidentiary inquiry" and filed a lengthy order, again denying Henry's §2255 motion. (Pet. App. 27a-51a). Judge Kellam never heard testimony, nor had he appointed counsel for Henry.

Relying on Agent Coughlin's affidavit, Judge Kellam decided that Henry's case did not come within the *Massiah* rule because Nichols was not employed to question Henry but merely to have attentive ears and report what he heard (Pet. App. 39a). Applying a new

gloss to the *Massiah* doctrine, Judge Kellam announced that "[t]here is no requirement an accused be furnished counsel when he wishes to shoot off his mouth" (Pet. App. 39a).

Judge Kellam rejected, Henry's allegations concerning Sadler's perjured testimony. Relying on O'Hara's affidavit, Judge Kellam decided that there was no sufficient showing that Sadler had testified falsely, and therefore Henry's "allegation that perjured testimony was knowingly used is without credible evidence to support" (Pet. App. 43a). As for Conway's affidavit in which Conway swore that Sadler said he would untruly tell the F.B.I that Henry robbed the bank in order to keep himself (Sadler) from going to prison, Judge Kellam declared: "The statement of Conway is not believable" (Pet. App. 43a).

Judge Kellam treated Henry's continuing complaints about Nichols' and Sadler's behavior as trifling: "in considering all the facts of the case and the assertions made by the complaint, even if it be conceded there was an error in the admission of the testimony of Sadler and Nichols, the error was harmless" (Pet. App. 40a). Judge Kellam then incorrectly stated that "without contradiction of any fact or circumstance, Henry was clearly identified by eyewitnesses as one of the bank robbers;" and that "he was clearly observed in the area, in the presence of Luck and Moore, the other two bank robbers"[6] (Pet. App. 40a).

[6]These factual errors were noted by Judge Butzner, in his concurring opinion on appeal: "On this score, the district judge's recollection of the evidence is inaccurate. The defendant was not identified by any witness to the robbery . . . I therefore join in . . . the conclusion that the error was not harmless" (Pet. App. 9a).

Henry appealed this second dismissal of his §2255 motion without a hearing, and the court of appeals appointed Henry counsel. Henry once again asserted that his right to counsel had been denied by the government's use of Nichols' testimony at his trial, in violation of *Massiah*. He contended that, although Judge Kellam had erred in failing to hold an evidentiary hearing on the remand, the addition of F.B.I. Agent Coughlin's affidavit to Nichols' trial testimony made the violation of his right to counsel sufficiently clear to warrant the court of appeals' reversing with a direction to vacate the conviction. That course, he argued, was preferable to a further remand, in light of the delays caused by the district court's continued mishandling of the motion to vacate. If the court of appeals found the record insufficient for outright reversal, he argued, a remand was required on both the right to counsel claim and the due process claim, because the district court, as to both claims, had failed to follow the first remand instruction and had failed to give Henry a chance to prove his claims at a hearing. After hearing argument, the court of appeals, with Judge Russell dissenting, reversed Judge Kellam's judgment and remanded with instructions that Henry's §2255 motion be granted and Henry be released unless the government elected to retry him. 590 F.2d 544 (4th Cir. 1978) (Pet. App. 1a-24a).

V. THE DECISION APPEALED FROM

The Fourth Circuit heard argument in Henry's second §2255 appeal over five years after trial. There was still

no developed record, because the district court had failed to follow the Fourth Circuit's direction to hold an "evidentiary inquiry." Instead of remanding again to Judge Kellam, the court decided the case on the trial record and the F.B.I. affidavits. Since the court decided on an outright reversal on the right to counsel issue, it did not reach the due process question, which could not have been finally resolved without a remand.[7]

Apply the rule established in *Massiah*, the court of appeals held that Henry's right to counsel was violated when the government used statements made to Nichols after Henry's indictment and in the absence of counsel or a knowing waiver (Pet. App. 7a). The court held that, even assuming Nichols obeyed his instructions not to interrogate Henry about the bank robbery, Nichols did engage in conversations with Henry. This would have been an interrogation within the meaning of *Brewer v. Williams*, 430 U.S. 387 (1977) "[i]f, by association, by general conversation, or both, Henry developed sufficient confidence in Nichols that Henry bared his incriminating secrets to an undisclosed paid informer . . ." (Pet. App. 7a). The majority found that even though other evidence had been introduced linking Henry to the robbery, "we cannot say beyond a

[7]If the Fourth Circuit's decision is not sustained by this Court, this case nonetheless should be remanded to that court for further proceedings concerning the necessity for a proper evidentiary hearing on both the right to counsel and due process issues. Deciding as it did, the court of appeals never had to decide whether Henry was right or wrong in claiming he was entitled to a full hearing and remand on the due process claim, and it never had to discuss whether, in the event outright reversal on the right to counsel claim was not sustained, there should be a full hearing on that claim.

reasonable doubt that Nichols' testimony did not influence the jury's verdict" (Ibid.).

In a concurring opinion, Judge Butzner added two decisive points. First, he pointed out that, by his own testimony, Nichols had not fully complied with the instruction not to engage [Henry] in conversation, but only to listen, because Nichols had admitted that he had "some conversations" with Henry. Under *Brewer v. Williams*, wrote Judge Butzner, the informant's conclusory statement that he did not question a defendant is not determinative. "The critical issue is whether, after judicial proceedings had been initiated against the defendant, an informant—acting as an agent of the government—elicited information from him in the absence of counsel. Proof of formal interrogation is unnecessary to invoke the protection of the Sixth Amendment. A conversation that is tantamount to interrogation is sufficient. 430 U.S. at 397-401" (Pet. App. 9a). The district court's judgment had to be reversed, because Nichols admitted talking to Henry, and Henry asserted that the conversation was a form of questioning (*Id.*).

Judge Russell dissented, arguing that the "crucial rule" promulgated by the majority that it was a constitutional violation to admit into evidence incriminating statements induced by an undisclosed paid informer-cellmate is effectively refuted by the ruling of this court in *Hoffa v. United States*, 385 U.S. 293, 302 (1966) that the constitution affords no protection to "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it, even when that person is an undisclosed informer (Pet. App. 17a). Contrary to the majority, Judge Russell read *Brewer v. Williams*, 430 U.S. 387 (1977) to establish

interrogation "as the key issue," (Pet. App. 11a) and he found none in this case.

Moreover, Judge Russell could find no case which distinguished on the grounds of constitutional admissibility between incriminating statements testified to by secret informers and by private individuals. As to information given to an undisclosed informer or a private individual, "there is no basis for treating the two situations differently for purposes of admissibility."[8] (Pet. App. 18a).

The government petitioned for a rehearing, but rehearing was denied over the dissent of Judges Russell, Widener and Hall. No. 77-2338, filed March 30, 1979. The government then filed for a writ of certiorari in this court (July 25, 1979). This court granted certiorari on October 1, 1979. United States v. Henry, No. 79-121, 48 U.S.L.W. 3186 (October 2, 1979).

SUMMARY OF ARGUMENT

The decision of the court of appeals falls well within the rule of *Massiah v. United States*, 377 U.S. 201 (1964). The court should not follow the government's invitation to merge the rule of *Massiah* with that of *Miranda v. Arizona*, 384 U.S. 436 (1966), because the right to an attorney declared in the latter case is a procedural safeguard for the privilege against self incrimination, while the *Massiah* right to counsel, with strong historical roots, recognizes a change in the relationship of the state and the accused brought about by formal judicial proceedings. Only in the *Miranda* situation is interrogation the crucial inquiry.

[8]The courts consistently had held that there is a distinction between an informer who is deliberately sent in to obtain information and an individual who comes to the government after getting information. In the former case, where the informer is sent in, the rule in *Massiah* applies. *See United States ex rel. Baldwin v. Yeager*, 428 F.2d 182 (3d Cir. 1970).

Despite the foregoing, the court of appeals correctly read the record to establish the equivalent to interrogation by a paid government informant and, contrary to the government's suggestion, it cannot avoid responsibility for the conduct of a regular, paid informant sent by an F.B.I. agent to gather information.

ARGUMENT

I.

THE COURT OF APPEALS CORRECTLY FOUND A VIOLATION OF HENRY'S SIXTH AMENDMENT RIGHT TO COUNSEL.

A. The Rule Established in *Massiah v. United States*

Under the government's theory of this case, Henry's right to counsel could only have been violated if the government caused him to be questioned about the offense. (Brief for the United States, p. 20). Equating questioning and interrogation, the government argues that neither term can fairly be applied to the facts established below. Id. at 21. It then argues that the right to counsel is really implicated only in "trial-like confrontations," id. at 28, and that the *Massiah* holding ought not to be viewed from a Sixth Amendment right to counsel perspective, id. at 36.

On close analysis, the government's position is nothing more than a request that the court overrule *Massiah*, leaving in its place nothing more than the "prophylactic" requirement of *Miranda v. Arizona*, 384 U.S. 436 (1966), as it has been more recently interpreted. See, e.g., *Michigan v. Tucker*, 417 U.S. 433 (1974). The proposal is bad law and bad history, failing to recognize the different values served by the *Massiah* and *Miranda* decisions, the differences in their origin and the differences in the rules developed by those cases.

The predominant object of the *Miranda* decision was to protect the privilege against compulsory self incrimination, which the court had recently held applicable to the states in *Malloy v. Hogan*, 378 U.S. 1 (1964). Concluding that the privilege was threatened by the inherently coercive nature of custodial interrogation, the majority fashioned a series of rules calculated to counteract the inherent compulsion of custody. Important among those rules, which the court has later described as "procedural safeguards," see *Michigan v. Tucker*, 417 U.S. at 433, was the right to the presence of an attorney, because in many cases it was only with the advice of counsel that the arrested person could make an informed decision as to whether to answer questions. Because of counsel's role as protector of the prisoner's privilege against self incrimination, the *Miranda* right to counsel is violated only when the police interrogate the prisoner without advising him of the right to counsel or without obtaining a sufficient waiver of that right.

The *Massiah* right to counsel, however, has much deeper roots, and is based on the notion that, once formal litigation has started between the government

and a criminal defendant, the changed relationship of the parties dictates that the government must recognize its adversary's right to the presence of an attorney—unless suitably waived—whenever it seeks to obtain evidence from him. It is for that reason that the right to counsel declared in *Massiah* and the right to counsel declared in *United States v. Wade*, 388 U.S. 218 (1967) and *Gilbert v. California*, 388 U.S. 263 (1967) are the same, the right of a defendant to have the assistance of counsel to protect his interests whenever the government, "after the initiation of adversary judicial criminal proceedings," seeks to obtain from him evidence for use against him in the pending proceeding. See *Kirby v. Illinois*, 406 U.S. 682, 689 (1972) (plurality opinion). See also *Moore v. Illinois*, 434 U.S. 220 (1977). It is also for that reason that violation of the right to counsel of a defendant against whom formal adversary judicial proceedings have begun is dependent neither upon the presence of a "trial-like confrontation" nor upon interrogation, but solely upon the government's efforts to obtain evidence from him without counsel or valid waiver. As will be seen below, the court long ago explicitly rejected "interrogation" as a test for the post indictment right to counsel. See *McLeod v. Ohio*, 381 U.S. 356 (1965), reversing *State v. McLeod*, 1 Ohio St.2d 60, 203 N.E.2d 349 (1964). It has implicitly rejected any requirement of a "trial-like confrontation" in *Massiah* and *Brewer v. Williams* and in the corporeal identification cases, *Wade* and *Gilbert*. Moreover, the court has wisely done so. Counsel's role when the government seeks information is much more than "simply to tell the accused to say nothing." See Brief for the United States, p. 32. Counsel may well advise

the accused when and under what circumstances to cooperate in the government's continuing evidence gathering and may, as he could have in this case, guarantee that any admissions ascribed to the accused were actually made and are accurately recorded.

As the Fourth Circuit correctly recognized, Henry's case falls squarely within the purview of *Massiah v. United States*, and has little to do with the concerns this Court articulated in *Miranda v. Arizona*, 384 U.S. 436 (1966).

The most striking aspect of Henry's case is the substantial similarity between Henry's case and Massiah's. Massiah was indicted on narcotics charges, retained a lawyer and was released. While out on bail Massiah's co-defendant Colson conversed with Massiah concerning their pending case, but Massiah was unaware that Colson had agreed to cooperate with government agents. Massiah talked freely to his friend and made several damaging admissions which were recorded by a government agent and used at trial. 377 U.S. at 202-203.

This Court held that Massiah's Sixth Amendment right to counsel had been violated where the government succeeded "by surreptitious means in listening to incriminating statements" made by an indicted defendant in the absence of his retained counsel. 377 U.S. 201.

The Court indicated that the decisive fact was Massiah's indictment, which clearly entitled Massiah to the assistance of counsel while awaiting trial. 377 U.S. at 204. Mr. Justice Stewart, drawing from his own concurring opinion in *Spano v. New York*, 360 U.S. 315 (1959), explained the theory underlying the

Massiah rule:

> "under our system of justice the most elemental concepts of due process of law contemplate that an indictment be followed by a trial, 'in an orderly courtroom, presided over by a judge, open to the public, and protected by all the procedural safeguards of the law' 360 U.S. at 327." 377 U.S. at 204.

One's right to counsel under *Massiah*, therefore, has nothing to do with the interrogation process or the protection against self-incrimination. Rather, *Massiah* is concerned that, once the formal litigation process has begun, "rudimentary constitutional principles require that [an accused] be afforded the full and effective assistance of counsel." *Milton v. Wainwright*, 407 U.S. 371, 382 (1972) (Stewart, J., dissenting). Therefore, "the clear rule of *Massiah* . . . is that once adversary proceedings have commenced against an individual, he has a right to legal representation whether or not the government 'interrogates' him." Kamisar, *Brewer v. Williams, Massiah, and Miranda: What is Interrogation? When Does It Matter*?, 67 Geo. L.J. 1, 33 (1978). Quite simply, *Massiah* did not turn on the question of whether there was an interrogation, whether Massiah was in custody, or whether *Massiah* was aware he was dealing with a government agent. It did turn on the fundamental right to the assistance of counsel when an accused has become caught up in the adversary system.

Shortly after *Massiah*, this Court reaffirmed that *Massiah* applies to exclude all incriminating statements obtained by government agents in the absence of counsel, rather than only to statements induced by government agents. *See McLeod v. Ohio*, 381 U.S. 356

(1965), *rvs'g State v. McLeod*, 1 Ohio St.2d 60, 203 N.E.2d 349 (1964) and *Beatty v. United States*, 389 U.S. 45 (1967), *rvs'g* 377 F.2d 181 (5th Cir. 1967).[9] In *McLeod* the defendant made incriminating statements "in the known presence of public officers" one week after he was indicted. 1 Ohio St.2d at 61, 203 N.E.2d at 351. The Supreme Court of Ohio affirmed the admission into evidence of the defendant's statements because of the absence of interrogation, but this Court reversed *per curiam*, on the authority of *Massiah*.

In *Beatty*, the defendant, who owned a gun shop, arranged a meeting with his friend, Sirles, who he did not know was working under the direction of Alcohol and Tax Division agents. The ATU agents wired Sirles with a shortwave radio, which transmitted Sirles' con-

[9]The government denigrates the court of appeals' reliance on *Beatty* and *McLeod*, claiming that summary dispositions carry less weight than cases fully argued on the merits. Brief for the United States, p. 26, n.12. The cases cited, however, do not prove the point. The holding of *Edelman v. Jordan*, 415 U.S. 651, 671 n.14 (1974) on the point was simply that stare decisis was outweighed by the importance of the question before the court, and, in *Parker v. Randolph*, 99 S. Ct. 2132, 2140, n.8 (1979), the criticism by Mr. Justice Rehnquist's opinion for the plurality of Mr. Justice Stevens' dissent for reliance on *Hopper v. Lousiana*, 392 U.S. 658 (1968), was based on the fact that, having merely vacated and remanded for reconsideration, the court never passed on the merits. Any criticism of that dissent for reliance on *Roberts v. Russell*, 392 U.S. 293 (1968), because of its character as a summary reversal is belied by its general acceptance as a precedent. Indeed, the fact that summary reversal is reserved for the clearest violations of prior decisions of the court suggests that the court considered *Beatty* and *McLeod* so clearly within *Massiah* that briefing and argument and an opinion on point were unnecessary.

versations with Beatty. Beatty discussed with Sirles the illegal sale of a machine gun to the informer. Because the defendant had initiated the contact and Sirles did not encourage or induce Beatty to make any statements or otherwise surreptitiously interrogate him, the Fifth Circuit held that the admission of conversations with the informer did not deprive the defendant of his Sixth Amendment rights. 377 F.2d 181, 188-189. Again this Court, in a *per curiam* decision, reversed the decision of the Fifth Circuit, on the authority of *Massiah*. 389 U.S. 45 (1967).

The facts in Henry's case are constitutionally indistinguishable from those in *Massiah*. Like Massiah, Henry was indicted and awaiting trial when he was befriended by Nichols, a paid, long-time informant who had previously agreed to cooperate with the F.B.I. At no time was Nichols like the prisoner who quite innocently overhears some conversations of a cellmate and then goes to the government with incriminating information. The F.B.I. deliberately contacted Nichols and asked Nichols to seek information about the robbery, and Nichols just as deliberately agreed to cooperate with his F.B.I. contacts. Like Massiah, Henry had no way of knowing that his jailhouse friend was working for the government against him. Indeed, in much the same way that Massiah had no idea he was being interrogated by the police but only assumed he was talking with his friend, so too did Henry converse with his cellmate Nichols. Like Massiah, then, Henry was very much the victim of an "extra-judicial, police-orchestrated proceeding" designed to elicit statements in the absence of counsel. 377 U.S. 204. Moreover, in the same way that this Court did not know exactly what Colson said to

Massiah or how he said it,[10] the record in Henry's case does not reveal what Nichols said to Henry, or how he said what he said. Henry's allegation that Nichols did indeed question him stands unrefuted by the record.

The only fact which distinguishes Henry's case is that the conversations with Nichols occurred in the Norfolk City Jail, whereas Massiah was free on bail when he conversed with Colson. The Fourth Circuit appropriately noted "because of the restrictive nature of the jailhouse setting, the instant case presents a far more compelling situation for the application of the *Massiah* rule." (Pet. App. 5a). Inmates are not usually allowed the luxury of choosing their own cellmates, which made Henry vulnerable to the busy traffic in and out of his closed quarters. It has been argued that, since a defendant's incarceration "is likely to bring into play subtle influences that will make them particularly susceptible to undercover ploys . . . these dangers would justify imposing a *Massiah*-like barrier on all undercover activity directed at an incarcerated subject." Dix, *Undercover Investigations and Police Rulemaking*, 53 Texas L. Rev. 203, 230 (1975). At the very least, the vulnerability of an indicted prisoner to undercover spies and their tricks argues against diminishing the protection which such a prisoner otherwise gets from the right

[10]This Court did not know, and "evidently the Supreme Court did not care" what Colson said to Massiah. Colson did not testify at trial. The government agent who overheard the conversation was not permitted to testify as to what Colson said, based on the best evidence rule. The record consisted only of Massiah's half of the conversation. On this point, *see* Kamisar, *Brewer v. Williams, Massiah, and Miranda: What Is Interrogation? When Does it Matter?*, 67 Geo. L.J. 1, fn. 272 (1978). In the present case, we have only Nichols' recollection of what Henry said to him.

to counsel simply because he is in jail, rather than on bail.

The facts in Henry's case amply demonstrate that his constitutional right to the effective assistance of counsel was violated, if not destroyed, by the government's actions in recruiting and encouraging Nichols to inform on Henry. Henry had been indicted and should have been afforded a trial "in an orderly courtroom, presided over by a judge, open to the public, and protected by all the procedural safeguards of the law." *Spano v. New York*, 360 U.S. at 327 (concurring opinion). Instead, Henry became the victim of an "extra-judicial, police-orchestrated proceeding," which this Court so strongly condemned in *Massiah*. In effect, Henry's cell was his courtroom, and his "trial" was presided over by Nichols and Sadler, who functioned as prosecution, judge, and jury. At this critical stage of his criminal proceeding, Henry had an absolute right to a lawyer's help.

B. Henry's Right To Counsel Was Violated If Either Nichols Induced Or Henry Volunteered His Statements.

Properly understood, *Massiah* applies to all incriminating statements obtained from the accused by government agents after indictment and in the absence of counsel or its waiver, rather than only to statements induced by government agents. (Pet. App. 5a-6a). *See McLeod v. Ohio, supra*, and *Beatty v. United States, supra*.

The rule of *Massiah* is inconsistent with the notion that, if a jail-plant acts simply as a "listening-post" and

a cellmate volunteers information, that the agent can testify concerning those statements. (Marshall, J., dissenting from dismissal of certiorari as improvidently granted in *Miller v. California*, 392 U.S. 616, 625 (1968),.

Jail plants are not placed in cells with defendants "to discuss the weather, to console [the defendant], or merely to provide [him] with companionship," but to obtain information and subvert an accused's right to counsel. *Id.* at 626. This conduct constitutes a clear violation of *Massiah* and "such deliberate police deception and subversion of a defendant's rights should not be condoned." *Id.* at 627.

It should be constitutionally irrelevant whether Henry volunteered any information, or whether Nichols induced Henry to make admissions through surreptitious means, by trickery or deception. It should also be constitutionally irrelevant if Henry initiated any conversations with Nichols. *See United States v. Anderson*, 523 F.2d 1192, 1196 n.3 (5th Cir. 1975). The thrust of *Massiah* "is to protect an indicted defendant who has counsel from the erosion of benefits of his Sixth Amendment right to counsel, done through procuring from him, in the absence of counsel, incriminating evidence that will facilitate his conviction." *Id.* at 1195.

C. The Fourth Circuit Was Correct In Concluding That Nichols Had Effectively "Interrogated" Henry Simply By Engaging Him In General Conversation.

The Fourth Circuit correctly concluded that this Court's holding in *Brewer v. Williams*, 430 U.S. 387

(1977), did not limit *Massiah* to cases in which the government has directly questioned the accused about his participation in the crime[11] (Pet. App. 6a-7a). Agreeing with the Fifth Circuit in *United States v. Anderson*, 523 F.2d 1192, 1196 (1975), the Fourth Circuit held that an undisclosed government agent may "effectively interrogate" a defendant simply by engaging the defendant in a general conversation. (*Id.*). *See also, Miller v. California*, 392 U.S. 616 (1968) (dissent from dismissal of certiorari).

In neither *Massiah* nor *Brewer* did formal interrogation of the defendants occur. Mr. Justice Stewart characterized Massiah's case as one in which the government "succeeded by surreptitious means in listening to incriminating statements." 377 U.S. at 201. There was no indication, in the record, that Colson questioned Massiah or was instructed to do so. Kamisar, 67 Geo. L.J. at 41, n.272 (1978). Similarly, this Court recognized that the detective's "Christian burial speech" to Williams was designed to elicit information "just as surely as—and perhaps more effectively than—if he had formally interrogated him." 430 U.S. at 399. Thus, the Fourth Circuit correctly concluded that neither *Massiah* nor *Brewer* require proof of a formal interrogation, but that a conversation may be tantamount to an interrogation and is sufficient to invoke the protection of the Sixth Amendment (Pet. App. 7a).

Moreover the *Brewer* court indicated that an accused

---

[11] *See* Kamisar, *Brewer v. William, Massiah and Miranda: What Is Interrogation? When Does It Matter?*, 67Geo. L.J.at 42, n.283 (1978): "I think [the author of both *Massiah* and *Williams*] would be startled to learn that, although when he authored the *Williams* opinion he evidently thought he was revivifying and expanding *Massiah*, he actually was restricting its scope. . . ."

in Williams' situation could waive his right to counsel, as long as the state could prove "an intentional relinquishment of a known right or privilege. . . ." 430 U.S. at 404 (quoting from *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938),. But a defendant in Henry's situation, on the contrary, can never relinquish or abandon a known right or privilege when he converses with an undercover agent.

In his concurring opinion, Judge Butzner accurately characterized both *Massiah* and *Brewer*: "[t]he critical issue is whether, after judicial proceedings [have] been initiated against the defendant, an informant–acting as an agent of the government–elicits information from him in the absence of counsel" (Pet. App. 9a). Moreover, the record supports the conclusion of Judge Winter for the court of appeals that Nichols and Henry had "conversations" which may have caused Henry to bare secrets. (Pet. App. 7a). Judge Butzner's brief concurrence likewise pointed to these conversations. (Pet. App. 8a) Although we believe it is unnecessary to the decision, even the truncated record caused by the district court's poor handling of the case confirms that Nichols "pumped" Henry for information. Thus, Nichols testified that he had "conversations" with Henry (A 28, tr 134) the product of which was the incriminating statements which Nichols attributed to Henry (A 28, tr 134-135). According to Nichols, Henry "[told him]" about the bank robbery (A 29, tr 135), "[gave him a] reason" for going in the bank (A 29, tr 136) and "describe[d] to [him]" the bank robbery (A 29-30, tr 137). Nowhere in Nichols' testimony do we see mention of him "overhearing" Henry. As a result, the record gives no basis to characterize Nichols as a

mere listener.

Although Nichols testified that Agent Coughlin did not have him ask Henry specific questions, Nichols did not testify that he asked none (A 28, tr 135). Agent Coughlin's affidavit does not assert that Nichols had not asked questions or engaged Henry in conversation but only that he told Nichols not to question (Pet. App. 58a). Even his affidavit recounts his authorization of Nichols' efforts to further ingratiate himself to Henry after Henry's later transfer to the Portsmouth City Jail.

D. The Fourth Circuit Correctly Concluded That Nichols' Questioning Of Henry Constituted A Government Interrogation.

The Court in *Brewer* held that "the clear rule of *Massiah* is that once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him." 430 U.S. at 401 (1977). The Fourth Circuit concluded simply that where the government employed Nichols as a paid informer to engage Henry in conversation and elicit admissions from him, "there was interrogation within the meaning of *Brewer*" (Pet. App. 7a). The government, relying perhaps on Judge Russell's dissent, now seeks to obscure Nichols' role as a paid government jail plant, and to recast him as a "fellow prisoner [who] asked questions of respondent on his own initiative and only later decided to convey the information to the government." (Pet. 13; Brief for the United States p. 45). This new characterization has absolutely no basis in either the record or the affidavits of both

F.B.I. agents; it is quite clear that Nichols was a paid F.B.I. informer before, during, and after the Henry investigation.

The applicability of *Massiah* turns on whether a government informer is sent into prison deliberately to procure information, as opposed to an individual who is in no way connected with the government and subsequently goes to the authorities after he has quite innocently obtained information. *United States ex rel. Baldwin v. Yaeger*, 428 F.2d 182 (3rd Cir. 1970). In *Baldwin*, the Third Circuit noted that "if the police deliberately isolated the defendant with prisoners who in the past cooperated with the police, fully intending to interrogate those prisoners before trial regarding statements made to them by the defendant," then such statements would be inadmissible, under *Massiah*, as a violation of a defendant's constitutional rights: *Id.* at 184-185, n.10.

It does not matter that the government did or did not place Nichols in the same cell with Henry (Pet. App. 59a). The fact remains that F.B.I. agent Coughlin contacted Nichols on November 21, 1972 (Pet. App. 57a), and, having learned that Nichols was isolated in the same cellblock with Henry, instructed Nichols to pay close attention to anything that Henry had to say about the charges against him (Pet. App. 58a). Nichols and Coughlin had worked together before, and Nichols had been paid by Coughlin and the F.B.I. for "expenses and services" in connection with information he had provided in the past (Pet. App. 57a). It takes little imagination to conclude that Nichols had every reason to believe he would again be paid for any information he could supply concerning Henry's case. It seems equally clear that, having established contact and

discovered the fortuitous circumstance of Nichols' placement in the same cellblock as Henry, the F.B.I. fully intended to interrogate Nichols concerning his conversations with Henry, prior to Henry's trial. As such, what occurred in Henry's cell was precisely the scenario envisioned and condemned by the court in *Baldwin, supra.* Nichols hardly can be characterized now as a person "in no way connected with the government," *Id.* at 184, and therefore outside the reach of *Massiah.*

Essentially, the government would have the court see only Agent Coughlin's conduct as that for which the government is responsible. Thus, Nichols' conduct would not be chargeable to the government except to the extent that it was specifically authorized by Coughlin and especially not if it was inconsistent with instructions.

Despite citation of a hodge podge of unrelated cases (Brief for the United States, pp. 48-49) the government produces no real support for this dangerous notion. The court has had little opportunity to discuss government responsibility for the malfeasance of its paid informants. In the one instance in which the government was charged with responsibility for a paid informant who ran amuck, *Sherman v. United States*, 356 U.S. 369 (1958), the court unanimously treated his conduct as that of the government.

When the government lures criminals to act on its behalf, as it did in this case, it must be made to understand that it will be responsible for their conduct. Under the best of circumstances, informers providing information or cases for pay or to "work off" their cases are hardly to be trusted as to their methods or

the truthfulness of their information. A ruling from this court that law enforcement officers can have the benefits produced by informants but that the government bears no responsibility for their excesses will be an invitation to abuse. Conversely, application of the normal rule of agency law that a principal is responsible for the wrongdoing of one who it hires to perform a task, see, e.g., *Allen v. International Alliance*, 338 F.2d 309, 318 (5th Cir. 1964) makes the government Nichols' principal.

There is no question, on this record, that it was regular F.B.I. practice for Agent Coughlin to pay Nichols to obtain and provide information (Pet. App. 57a) and that Coughlin was authorized to do so. The length of their relationship gave Agent Coughlin ample time to measure the kind of man he was hiring. Even assuming that the *Massiah* violation in this case dependent on Nichols' disobeying, rather than following, Agent Coughlin's directions, Nichols' actions must be charged to the government. The fact that Nichols was an informant, rather than a trained agent, suggests a greater, rather than lesser, need for his target to have counsel, because he could hardly be expected to show the "due regard for all legal considerations" of a trained agent like Agent O'Hara (A 84).

CONCLUSION

The judgment below should be affirmed.[12]

Respectfully submitted,

MICHAEL E. GELTNER
LARRY J. RITCHIE
WILLIAM W. GREENHALGH
Georgetown University Law Center
Appellate Litigation Clinic
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
Tele: (202) 624-8296

Attorneys for Respondent

---

[12]Recognizing that the issuance of a writ of certiorari is a matter of sound discretion exercised by the Court without the benefit of the record below or briefs on the merits, it should now be apparent to this Court that the facts in Henry's case, are constitutionally indistinguishable from those in *Massiah v. United States*, 377 U.S. 201 (1964). That being so, the Court may conclude that, rather than writing an affirmance opinion, it is appropriate to dismiss the writ as improvidently granted. *Belcher v. Stengel*, 429 U.S. 118 (1976); *The Monrosa v. Carbon Black, Inc.*, 359 U.S. 180 (1958). If the Court agrees with our view of the case, the strongest reason for decision, rather than dismissal of the writ in this case would be to resolve an apparent "conflict" in the circuits, based on a contrary holding in *Wilson v. Henderson*, 584 F.2d 1185 (2d Cir. 1978). In *Wilson*, a murder suspect, after formal indictment, talked with his cellmate and admitted complicity in the murder. The cellmate (who previously agreed to act as a police informant) had been instructed "just to keep [his] ears open." With two visiting district judges forming

(continued)

(footnote continued from preceding page)

the majority, the court held that the cellmate had not "interrogated" Wilson and, therefore, Wilson's statement were not barred by the *Massiah-Williams* rule. Wilson petitioned this Court for certiorari, but the petition was untimely and denied for that reason. Had certiorari been granted, *Wilson* should have been summarily reversed on the basis of *Massiah*, as this Court has previously done in *McLeod v. Ohio*, and *Beatty v. United States, supra.*